(22,239.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 618.

NORMAN H. DAVIS AND CHARLES T. PHILLIPS, APPELLANTS,

vs.

THE LAS OVAS COMPANY, INCORPORATED.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

No. 2030.

THE LAS OVAS COMPANY, INCORPORATED, Appellant,
vs.
NORMAN H. DAVIS ET AL.

and

No. 2033.

NORMAN H. DAVIS and CHARLES T. PHILLIPS, Appellants,
vs.
THE LAS OVAS COMPANY, INCORPORATED.

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a Supreme Court of the District of Columbia.

No. 25622.

THE LAS OVAS COMPANY, INCORPORATED, a Body Corporate, Complainant,
vs.
NORMAN H. DAVIS and CHARLES T. PHILLIPS, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to-wit:—

1 *Bill.*

Filed August 7, 1905.

In the Supreme Court of the District of Columbia.

No. 25622, Equity Doc. —.

THE LAS OVAS COMPANY, INCORPORATED, a Body Corporate, Complainant,
vs.
NORMAN H. DAVIS and CHARLES T. PHILLIPS, Defendants.

To the Supreme Court of the District of Columbia, Holding an Equity Court for said District:

The complainant shows to the court as follows:

1. The complainant is a body corporate, duly incorporated under

the laws of the State of Virginia, and sues in its own right. The defendants Norman H. Davis and Charles T. Phillips are residents of the Province of Havana, in the Island of Cuba, and are sued in their own right, as hereinafter shown.

2. Heretofore, to wit, in or about the month of February, 1904, the said defendants represented to George C. Reid, one Billings and sundry other persons that they, the said defendants, alone or in conjunction with other parties, had secured an option of purchase on a tract of land in the Island of Cuba, comprising 4,000 acres, owned by a certain widow Tarafa, also known as the widow Acosta, at and for the price of $25,000; that the said price was an exceedingly
2 advantageous one for the purchasers, the circumstances of the said widow Tarafa, or Acosta, being such as to compel her to make sale of the said land at a sacrifice, and the said defendants thereupon proposed that a stock company or corporation should be organized with a capital stock of $150,000 for the purchase, development and exploitation of the said tract of land, further representing that one-half of the said purchase price should be paid in cash, and the residue in twelve months, that $5,000 in addition thereto would be necessary for the development of the enterprise, and the said defendants would accept forty per cent of the stock of the proposed company as the share of themselves and their associates for their services in obtaining the said option and in promoting and carrying out the enterprise, that the remaining stock should be apportioned among the persons who should subscribe and furnish the necessary moneys for the purpose, and that they, the said Phillips and Davis, would themselves subscribe for and take $30,000 of the remaining $90,000 of the said proposed capital stock of the said company.

3. Shortly after the said representations of February, 1904, the defendants Davis and Phillips further represented to the said George C. Reid and others that they had secured, or could secure, an option to purchase 6,000 acres of the said land from the said Widow Tarafa, instead of the 4,000 acres originally proposed, for the price of $35,000, and that it would be very advantageous and profitable to purchase this tract or quantity of land at the said price, to be
3 paid for, held, developed, exploited and sold by the corporation to be formed in the manner, upon the basis, and according to the method above described.

4. Influenced by and relying upon the said representations of the said defendants, George C. Reid, Hilary A. Herbert, the said Billings and other persons consented to join the said defendants in the said enterprise, subscribed for the stock of the said proposed corporation, and agreed to advance the necessary moneys, further agreeing that the said defendants and their associates should be allowed forty per centum of the proposed capital stock of the said corporation, when formed, for their said option and for their services, rendered and to be rendered, in acquiring the said land and in promoting the said enterprise, the residue of the said capital stock to be apportioned among the persons who should advance the necessary money to purchase the said land, and to carry forward the said enterprise as proposed—

by virtue of which agreement, as the complainant is advised, believes and avers, the defendants became agents and trustees for the proposed corporation which it was agreed should be thereafter formed, namely, for the complainant, and it thereupon became their duty, in good faith, to act as such agents and trustees, in the interest and for the benefit of the said corporation, to secure the said land for it at the lowest price for which the same was obtainable, and to make no profit out of the transa[illegible], and especially at its cost and to its disadvantage, other than [illegible]ir agreed compensation of forty per centum of its capital stock.

5. Shortly after the said agreement between the said defendants and the said proposed shareholders in the said corporation
4 to be thereafter formed, the said George C. Reid and other prospective stockholders agreed with Benjamin Micou, Esq., who was one of the parties represented by the defendants to be associated with them in the matter of securing and owning the said option, to visit Cuba, and provided he found the said land to be suitable, and the title thereto to be good and unincumbered, to purchase the same at and for the said price of $35,000, one-half to be paid in cash, and the remaining moiety to be secured by a mortgage at twelve months, the said Reid furnishing the said Micou with the sum of $6,611.15, and the other proposed stockholders similar advances in proportion to their subscriptions to the stock of the proposed corporation, according to complainant's best information, knowledge and belief. On arriving in Cuba, the said Micou being unable to speak or understand the Spanish language, the examination of the land was made by persons procured by the defendants and represented by them as suitable for the purpose, and the said Micou was introduced by the defendant Davis to one Claudio Gonzales de Mendoza, who was represented by the defendants to be a Cuban lawyer of integrity and ability, upon whom the said Micou might safely rely in the matter of the title and in the consummation of the proposed purchase, and, as the complainant is informed and believes, and therefore avers, it was further represented to the said Micou, by or through the instrumentality of the said defendants that, because of some interests in the said land alleged to be vested in certain minor children of the widow Tarafa, it was necessary, in accordance with the Cuban law, that there should be an inter-
5 mediary in the matter of the requisite conveyances, by reason whereof a deed to the said Micou, representing the proposed future corporation, was made, not by the widow Tarafa, but by Gustavo E. Escalante, purporting to convey 6,000 acres of the said land, but which complainant has reason to believe does not, in fact, convey nearly so large a quantity, the said deed being in the Spanish language, and the said Micou, as the complainant is informed, thereupon paid the moneys with which he had been so provided for the purpose, the exact amount of which is to the complainant unknown, but which sum, with the advance which the defendants were to add thereto, aggregated $17,500, the said payment being made, according to complainant's best knowledge, information and belief, to the defendants for delivery to the vendor, the remaining purchase

money of $17,500 being secured by two mortgages given by the said Micou upon the said property for that amount, payable within one year from the said transaction, or in the month of March, 1905, both conveyances, namely, the deed from the widow Tarafa to Escalante and the deed from Escalante to Micou, being left with the defendant Davis for the purposes of record or registration.

6. Thereafter, to wit, in the month of May, 1905, the complainant the Las Ovas Company, Incorporated, was duly organized under the laws of Virginia, and thereafter, to wit, on or about the 15th day of September, 1904, the said Benjamin Micou conveyed the said tract of land to the said complainant corporation, the defendant Norman H. Davis acting as its attorney, under a power of attorney to him by it thereunto duly executed, for the purpose of
6 accepting the said conveyance in accordance with the laws of Cuba, and the said corporation thereafter paid the remaining $17,500 of the alleged purchase money for the said tract of land, secured by the mortgages given by the said Micou as aforesaid, upon the representation of the defendant Davis that, as ascertained by and upon an examination thereof by him duly procured and had, the title to the said land was good and unencumbered, with the exception of a small mortgage, which was more than forty years old, and which was therefore outlawed and without legal force.

7. The complainant has recently learned, and upon its best knowledge, information and belief avers, that the defendants obtained the option upon the said land from the widow Tarafa at and for a sum greatly less than the price which they so as aforesaid represented to the said Reid, Herbert, Sowers and other subscribers to the stock of complainant company, namely, at a price not exceeding $20,000, and, it has reason to believe, for a price considerably less than that sum, the said Sowers having become the assignee of six shares of the capital stock of the complainant company subscribed for by the said Billings upon the representations of the defendant Davis, which were corroborated by the defendant Phillips, that the said land had been bought from the widow Tarafa for $35,000.00, that the said sale was a great sacrifice upon the part of the said Tarafa, who was compelled to sell, and that the said land was worth not less than twenty dollars per acre; that the intervention of the said Escalante in the matter of the said conveyances was, not for the purpose, as alleged, of overcoming technical difficulties under
7 the laws of Cuba growing out of the rights of minor children of the widow Tarafa, but for the purpose of avoiding disclosures of the real price for which the widow Tarafa sold the said land; that the said price of $35,000 was nearly or quite double the then market value of the said land; that the deed by which the said widow Tarafa conveyed the said land to said Escalante alleged a consideration of $20,000 only, and was executed and delivered simultaneously with the conveyance from the said Escalante to the said Micou upon a consideration therein stated of $35,000; that the money received by the widow Tarafa for her said land, so by her conveyed to the said Escalante, was paid to her out of the identical money furnished to said Micou by the subscribers to the stock of the

proposed corporation, the difference between the cash payment made by the said Micou, and the cash payment made by the widow Tarafa, which difference, upon its best knowledge, information and belief, the complainant avers was several thousand dollars, being unaccounted for by the said defendants, or by the said Escalante, whom the complainant, upon its information and belief avers was merely a representative or agent of the defendants, neither the widow Tarafa, nor the complainant corporation, or its stockholders, receiving any part of the said difference; that, not only so, but all the preliminary expenses of the conveyance from the said Tarafa to said Escalante, including the examination of the title, the recordation and notary fees, and other expenses, aggregating a large sum of money, to wit. the sum of $1696.00 were, with the knowledge and by the procurement of the defendants, charged up against and
8 without knowledge of the facts, paid by the complainant, and not by the said Escalante; and, in addition, both the deed from the said Tarafa to the said Escalante, and the deed from the said Escalante to the said Micou, showed, upon their face, numerous encumbrances affecting the title to said property, and constituting charges against the same, all knowledge of which, as they are informed and believe, and therefore aver, was withheld from the said Micou by the defendants, and by the said Cuban lawyer so as aforesaid procured by them for the said Micou, though well known both to the said defendants and to their said agent Mendoza; and that, by reason thereof, the complainant corporation has been greatly defrauded.

8. The complainant is advised and believes, and therefore avers, that, having induced its stockholders to enter upon and consummate the purchase of the said land, as hereinbefore set forth, upon the representations of the defendants that $35,000 was the lowest price for which the vendor would sell, and having contracted to represent its said stockholders and the corporation thereafter to be organized, namely, the complainant company, as their and its agents in the transaction, for an agreed compensation of forty per centum of its capital stock, it was a violation of the legal duty of the defendants to conceal from its said stockholders, and from it, the fact, well known to the defendants, that the said land could be purchased at a much lower sum than [illegible], and to conceal from them the fact, also well known to the defendants, that the title to the said land was subject to encumbrances, and to permit and cause
9 to be charged against the complainant the expenses of the transaction between the widow Tarafa and the said Escalante, and to conduct themselves otherwise secretly, for their own profit, to the disadvantage and wrong of the complainant, as is hereinbefore shown; and that the said defendants are accountable to it in this court for their said inequitable conduct, and are chargeable in its favor, not only with all profits which they have thus illegally made, at the expense of the complainant, representing itself and its stockholders, but with all losses which it has sustained by reason of their said misconduct in their said capacity of agents and trustees for it and for its stockholders. The defendant Phillips, as the complain-

ant is informed and believes, and therefore avers, has assigned all his stock in the said corporation to his co-defendant Davis, who is the holder of forty-nine shares thereof, representing in part the shares of himself and of said Phillips in the forty per centum of the capital stock of complainant allowed them for their option and services as aforesaid, and in part for moneys claimed to have been advanced by them for the purchase of the said land and the conduct of the said enterprise, little if any money, however, having been so advanced or expended other than the moneys contributed by the said Reid, Herbert, Sowers and other innocent stockholders, according to the complainant's best knowledge, information and belief, each share of the complainant's capital stock being of the par value of $1000.00. The complainant is advised and believes, and therefore avers, that the defendants have forfeited their right to
10 any promoters' stock or compensation for their services, because of their misconduct hereinbefore set forth, and that any other shares of stock held by them, or by either of them, are justly subject to investigation and examination in this court as to what, if anything, was really paid therefor by the said defendants, or either of them, and are chargeable with any profits or moneys in the hands of the defendants, or either of them, for which they are in equity accountable to this complainant, by reason of the premises.

Wherefore, and because it is without adequate remedy at law, the complainant prays as follows:

1. That Norman H. Davis and Charles P. Phillips may be served with process, made parties defendant hereto, and required to answer the exigencies of this bill, answer under oath by the said defendants, and by each of them, being hereby expressly waived.

2. That the said defendants, and each of them, be required to account in this court for all profits secretly made by them out of or in connection with the transaction in the bill set forth, and for all losses sustained by the complainant by reason of the misconduct of the defendants, and of each of them, in the bill alleged.

3. That the defendant Norman H. Davis be decreed to surrender to the complainant corporation the forty-nine shares of its capital stock held by him, to be canceled, or to be held for the benefit of the complainant, or of its innocent stockholders.

4. That the complainant may have such other and further
11 relief as the nature of its case may require.

THE LAS OVAS COMPANY, INCORPORATED,
By GEO. C. REID, *Its Secretary and Treasurer.*

J. J. DARLINGTON,
Solicitor.

STATE OF MASSACHUSETTS,
County of Essex:

I, George C. Reid, on oath say that I am the secretary and treasurer of the Las Ovas Company, Incorporated, the complainant in the foregoing bill signed by myself as its secretary and treasurer; that I have read the said bill, and know the contents thereof, that

the allegations therein set forth as of personal knowledge are true, and that those set forth upon information and belief I believe to be true.

GEO. C. REID.

COMMONWEALTH OF MASSACHUSETTS,
County of Essex, Gloucester:

Subscribed and sworn to before me this third day of August A. D., 1905.

[SEAL.] WILLIAM L. ROBINSON,
Notary Public.

12 *Answer of Norman H. Davis.*

Filed November 7, 1905.

In the Supreme Court of the District of Columbia.

No. 25622. Equity.

LAS OVAS COMPANY, INCORPORATED, Complainants,
vs.
NORMAN H. DAVIS ET AL., Defendants.

Now comes the Respondent, Norman H. Davis, not waiving any of the manifold errors and imperfections of the Bill, but reserving to himself the right to demur, except or object to the same as he may be advised, and makes this his answer to so much of said Bill as he is advised it is necessary and material for him to answer, and for answer says:

1. Respondent admits the allegations of the first paragraph of the Bill, except the allegation that the Complainant sues in its own right which he denies.

2. Respondent admits that in or about the month of February, 1904, he represented to George C. Reid and L. C. Billings that he and his co-defendant, Charles T. Phillips, in connection with other parties, had secured an option of purchase on a tract of land in Cuba comprising about four thousand acres, more or less, and belonging to the widow Tarafa. And respondent avers that he and said Phillips then offered to sell said land to said Reid or Billings or both of them for the sum of $25,000, but he denies
13 that he ever represented to said Reid or Billings or to any other person that they had paid the widow Tarafa the sum of $25,000 for said option, or that the terms of said option provided for the payment of said sum to the widow Tarafa as the purchase price of said land, and he denies that he represented to the said Reid or any other person that the circumstances of the widow Tarafa were such as to compel her to sell said land at a sacrifice. And respondent denies that he proposed that a stock company or corporation be organized for the purchase of said land, but he avers that the proposal to sell said land was followed by negotiations which resulted in a

contract for the purchase of said land and the formation of a stock company, which contract will be hereinafter more fully described.

3. Respondent denies the allegations contained in the third paragraph of the Bill, and avers that shortly after making the contract referred to in the second paragraph of this answer, he and the said Phillips represented to the said Reid that they could purchase from the widow Tarafa an additional tract of land adjoining the tract hereinbefore referred to for about the sum of $10,000, and that such purchase would, in their opinion, be advantageous and profitable in connection with the said 4,000 acre tract.

4. For answer to the 4th paragraph of the Bill, respondent avers that at the time and as a result of the negotiations described in the 2nd paragraph hereof, Hillary A. Herbert and Benjamin Micou, composing the partnership firm of Herbert & Micou, George C. Reid, Charles T. Phillips, one of the defendants hereto, and respond-
14 ent entered into an agreement which provided that they should organize a corporation with a capital stock of $150,000, divided into 150 shares of the face value of $1000 each; that Respondent and Phillips and Herbert & Micou should exercise the option referred to in the 2nd paragraph of this answer and acquire the said 4,000 acre tract of land, which it covered; that said corporation should then purchase it from them for the sum of $25,000 and 40 per cent, or 60 shares of its capital stock; that the remaining 60 per cent or 90 shares of its capital stock should be taken by the parties to the agreement at one-third of its face value or $30,000, of which the sum of $25,000 was to be applied to the purchase of the said 4,000 acre tract of land, and the remainder, $5,000, was to remain in the treasury of the company to meet operating expenses, and that said land when acquired by said corporation should be disposed of in lots of 10 acres or other size suitable for groves of oranges, lemons, grape-fruit or similar fruits. This agreement was not to go into effect until the parties to it had sent some one to Cuba to examine the land and investigate the title to it. If the title was found to be good and the land suitable for growing citrous fruits the agreement was to remain in force, otherwise it was to be of no effect.

And Respondent avers that L. G. Billings was not a party to this agreement and had no interest in it except that he had expressed a desire to share in the enterprise and it was understood among the parties to the agreement that if he so desired he should be allowed to take six of the remaining 90 shares as hereinbefore de-
15 scribed upon the same terms as the parties to the agreement were to take this stock. And Respondent denies that any other person was a party to or had any interest in said agreement. And Respondent further denies that anything in said agreement contained made his co-defendant Phillips or himself trustees or agents for said corporation or made it their duty to sell said land to said corporation or to any other person at the same price they were to pay for it, and make no profit out of the transaction.

5. Respondent denies that shortly after making said agreement described in the 4th paragraph hereof the said Reid and other pros-

pective stockholders in said corporation sent Benjamin Micou to Cuba invested with power to act for them in completing the transaction provided for by said agreement, and Respondent denies that there were any such other prospective stockholders.

And Respondent avers that in the month of March, after said agreement was made, said Reid and said Micou went to Cuba and Respondent and his co-defendant Phillips then made to them the representation set out in the 3rd paragraph of this answer in regard to the purchase of the additional tract adjoining the said 4000 acre tract; that Reid, Micou and Respondent in company with a person selected by Reid, who was familiar with the values and uses of land in Cuba, went upon said land and made a thorough inspection of the said original and the said additional lands. Respondent avers that the person so selected by Reid to examine said land was theretofore unknown to him and to his co-defendant Phillips, and
16 he denies that said examination was made by persons secured or recommended by him or his said co-defendant.

Respondent avers that the widow Tarafa demanded the sum of $9,000 for the said additional tract hereinbefore referred to and that it was estimated to contain about 1000 acres; that after the said examination of the land, the said Reid, Micou, for Herbert & Micou, Phillips and Respondent entered into a new agreement modifying the old agreement by providing that they should purchase 5,000 acres, more or less, the same being the tract of about 4,000 acres referred to in their said first agreement, and the additional tract of about 1,000 acres hereinbefore referred to, and should pay for these tracts the aggregate sum of $34,000, which sum should be paid one-half in cash and one-half in 12 months from the date of said agreement; that instead of Phillips, Herbert & Micou, and Respondent receiving 40 per cent. or 60 shares of the capital stock of said corporation, the said 60 shares should be equally divided between the parties to the agreement, Reid, Phillips, Herbert & Micou, and Respondent, each receiving 15 shares; that the remaining 60 per cent. or 90 shares should be taken by the parties to the agreement, as follows: Phillips 22 shares, Reid 35 shares, Micou 17 shares and Respondent 10 shares, each of said parties agreeing to pay for the stock so taken by him such sum as would make all contribute in proportion to their holding of the said 90 shares and would aggregate $39,000, of which $34,000 was to be applied to the purchase of the land, and $5,000 was to be held as an expense fund; that if the said L. G. Billings should
17 not take the 6 shares provided for him as set out in the 4th paragraph of this answer, they should be taken by the parties to said agreement in proportion to their stock, and that said Micou should take the title to said land until said company should be formed. And Respondent avers that this agreement was carried out and the said tracts of land were purchased as therein provided, and the title to the same conveyed to said Micou.

Respondent avers that he and his co-defendant Phillips introduced Micou and Reid to Claudio Gonzales de Mendoza and represented him to be a Cuban lawyer of integrity and ability, and that said Mendoza at the request of all the parties to said agreement made an

investigation of the title to said land and advised and counseled them in regard to the transfer of the same to Micou. Respondent avers that said Mendoza, before the transfer of said land to Micou, reported to the parties to said agreement that there were three several incumbrances upon said tract of land in the form of what is known in Cuban law as "censos," which as Respondent is informed and believes, is a species of ground rent, the principal of which becomes due only at the option of the debtor who pays interest at the rate of 5 per cent. per annum; that one of these "censos" was for $1333 and encumbered a portion only of said tract of land; that another was for $900 and encumbered another portion; that another was for $5400 and encumbered this tract and another much larger tract of which this had been a part when the "censo" was created; that when the original tract was divided, parties taking other portions of it had assumed the payment of the interest on this "censo" and that
18 since that time no demand for the same had been made upon the owner of the Tarafa estate. Respondent further avers that said Mendoza advised that on account of said last named "censo," it was desirable to have the title to said land conveyed to Micou through some one other than the widow Tarafa, and respondent and his co-defendant Phillips procured Gustavo E. Eschalante to take the title from the widow Tarafa and convey it to Micou. Respondent has no knowledge of any interest in said property which was vested in any minor children of the widow Tarafa and denies that he ever represented or procured any other person to represent to any one that on account of them it was necessary to have said Eschalante to act as an intermediary in the transfer of said title. Respondent further avers that neither he nor his co-defendant Phillips is a Cuban lawyer or in any way competent to pass upon the validity of a conveyance of or a title to land in Cuba, which fact was well known to both Reid and Micou; that they as well as the said Micou and Reid were obliged to rely entirely upon the advice of said Mendoza; that said Mendoza is a Cuban lawyer of excellent reputation for integrity and professional skill and that they have no knowledge of any incumbrance on said land other than those hereinbefore described.

Respondent avers that after the discovery of the said "censo" of $5400, the owner of the property in consideration of the possibility of its becoming a charge upon said land, and the additional payment of $1000, agreed to add to the said tracts hereinbefore described another portion containing a lake and about 500 acres of land,
19 and this agreement was accepted by the said Reid, Micou, Phillips and Respondent, and the said addition was included in the said conveyance to Micou.

Respondent avers that at the time of the said conveyance neither he nor his co-defendant Phillips nor Reid nor Micou knew the exact number of acres in the tract conveyed, and that each had the same opportunity to form an estimate of it, but since said conveyance said tract has been surveyed, and as Respondent is informed and believes, contains 5,558 acres. Respondent admits that all the purchase money provided by said agreements to be paid for said lands

has been paid, but he does not know and can not say how much of these payments has been made by each of the respective parties to it.

6. Respondent admits the allegations of the 6th paragraph of the Bill, except he denies that he at that time, or at any other time, made any representations in regard to the title to said land.

7. Respondent avers that under the terms of their option contract he and his co-defendant Phillips paid to the widow Tarafa the sum of $10,000 for the 4000 acres covered by said contract, and he avers that they spent in addition in securing said option and selling said land about the sum of $3000; but Respondent again denies that he or his co-defendant ever represented to Reid, Herbert or Sowers that the land was to or had cost them any other sum, and Respondent denies that there ever has been any subscriber to the stock of said company other than Herbert & Micou, Reid, Phillips and Re-
20 spondent. And Respondent avers that the sums of $9000 and $1000, respectively, were paid to the widow Tarafa for the first and second additions to said tract, as hereinbefore described, and that all the parties to the agreement were fully apprised of this at the time it was done.

And Respondent avers that the said L. G. Billings refused to take the 6 shares of stock provided for him, as set out in the 4th and 5th paragraphs of this answer, and Respondent took the right to said shares of stock when they should be issued, with the understanding that if he could not sell them, the said Herbert & Micou, Reid and Phillips would share them with him; that in the month of May, 1904, just prior to the time when the title of said Company was secured, Respondent was in Washington, and either Reid or Micou informed him that Reid had gotten Z. T. Sowers interested in the prospect of the Las Ovas Company, and suggested that he try to sell to Sowers the right to the said Billings' stock; that thereupon Respondent called upon the said Sowers, and with the assistance of said Reid and Micou, sold the right to the said stock when issued at a price greater than Respondent had paid for it. And Respondent avers that at the time he sold said right to stock to Sowers, said Sowers was informed that he was buying it at an advanced price, and Respondent denies that he or his co-defendant Phillips represented to said Sowers that the widow Tarafa had received $35,000 for said land or that she was compelled to sell at a sacrifice or that the land could be sold for $20 an acre.

Respondent denies that the said price of $35,000 was dou-
21 ble the value of said land and he avers that at the time said land was conveyed to Micou it was worth a much larger sum and has ever since been and is now worth a much larger sum than $35,000.

Respondent denies that the expenses of the conveyance from Tarafa to Eschalante were paid by Complainant, and he avers that the expenses of the conveyance from Eschalante to Micou, including the examination of title, recordation, notary fees and other expenses were paid by the parties to said agreement, as they should have been.

And Respondent is advised that he has already hereinbefore suffi-

ciently answered all the remaining allegations of the 7th paragraph of the Bill.

8. Respondent denies that he or his co-defendant Phillips has been guilty of any inequitable conduct or are chargeable in favor of Complainant or any other person with any profits made in said transactions. And Respondent avers that all of the contracts and transactions of himself and his co-defendant Phillips with regard to the purchase of said land were with Reid and Herbert & Micou, and none of them were with Complainant; that said transactions were fully completed and the conveyance of said land was made to Micou, and all the stock of said company was provided to be taken by Reid, Herbert & Micou, Phillips and Respondent before Complainant Corporation was brought into being.

And Respondent avers that after the charter of said company was secured the said Reid obtained by purchases of stock which had been subscribed for by said Phillips and Micou a majority of the shares thereof, and made a pretended transfer without any con-
22 sideration as Respondent is informed and believes, of one share each to his son, Conrad Reid and —— Kane, who is in his employ, for the sole purpose of making them Directors of said Company, and in the absence of Respondent in Cuba, giving him control of the Board of Directors; that the stock of said company is now and was at the time of the filing of this Bill held as follows, as Respondent is informed and believes: George C. Reid 74 shares, Conrad Reid 1 share, —— Kane 1 share, Herbert 9 shares, Sowers 6 shares, Phillips 7 shares and Respondent 42 shares; that all of these stockholders are directors except the said Phillips. And Respondent avers that the purpose of said Reid in securing control of said corporation was to drive other stockholders and particularly this Respondent out of said company and secure their holdings at the smallest possible price and that this Bill is filed by him in furtherance of this evil design. And Respondent avers that he is the Vice President and a Director of said Company, and the said Reid is the Secretary thereof, and that notwithstanding these facts, the said Reid in pursuance of his said purpose to exclude Respondent from participation in the management of the affairs of said Company has purposely failed to notify Respondent of special meetings of its Board of Directors and has procured the said Company to exclude Respondent from any participation in the management and control of the Company's property in Cuba although Respondent is the only one of its officers or stockholders who resides there; that Respondent has from time to time had inquiries from prospective purchasers of
23 portions of said property, but has not been able to give them any encouragement owing to the said attitude of Reid toward him and toward the said property. And Respondent avers that said property is a very valuable one, capable of great development and worth a much greater sum than was paid for it by said Company, and that it is solely due to this misconduct on the part of said Reid that the original project has not been carried to a successful termination.

And Respondent avers that in making this answer he does not

waive the right given to him by the order of this court passed in this cause on the 9th day of October, 1905, to renew his motion to strike the Bill from the files and quash the writ of subpœna.

And Respondent is advised that he has already hereinbefore sufficiently answered all the remaining allegations of the 8th paragraph of the Bill.

And now having fully answered all the allegations of the Bill which he is advised are material and necessary to be answered, Respondent prays that he be hence dismissed with his reasonable costs in this behalf incurred.

NORMAN H. DAVIS, *Respondent.*

SAM'L A. PUTMAN,
Solicitor for Defendant.

24 *Answer of Charles T. Phillips.*

Filed November 7, 1905.

In the Supreme Court of the District of Columbia.

No. 25622. Equity.

LAS OVAS COMPANY, INCORPORATED, Complainant,
vs.
NORMAN H. DAVIS ET AL., Defendants.

Now comes the Respondent, Charles T. Phillips, not waiving any of the manifold errors and imperfections of the Bill, but reserving to himself the right to demur or object to the same as he may be advised and makes this his answer to so much of said Bill as he is advised it is necessary and material for him to answer and for answer says:

1. Respondent admits the allegations of the first paragraph of the Bill, except the allegation that the Complainant sues in its own right, which he denies.

2. Respondent admits that in or about the month of February 1904, he represented to George C. Reid and L. G. Billings that he and his co-defendant, Norman H. Davs, in connection with other parties had secured an option of purchase on a tract of land in Cuba, comprising about 4000 acres, more or less, and belonging to the widow Tarafa. And Respondent avers that he and the said Davis then offered to sell said land to said Reid or Billings or both of them for the sum of $25,000 but he denies that he ever represented to said Reid or Billings or to any other person that
25 they had paid the widow Tarafa the sum of $25,000 for said option, or that the terms of said option provided for the payment of said sum to the widow Tarafa as the purchase price of said land, and he denies that he represented to said Reid or to any other person that the circumstances of the widow Tarafa were such as to compel her to sell said land at a sacrifice. And Respondent denies that he proposed that a stock company or corporation be organized

for the purchase of said land, but he avers that the proposal to sell said land was followed by negotiations which resulted in a contract for the purchase of said land and the formation of a stock company, which contract will be hereinafter more fully described.

3. Respondent denies the allegations contained in the 3rd paragraph of the Bill, and avers that shortly after making the contract referred to in the 2nd paragraph of this answer, he and the said Davis represented to the said Reid that they could purchase from the widow Tarafa an additional tract of land adjoining the tract hereinbefore referred to for about the sum of $10,000 and that such purchase would in their opinion be advantageous and profitable in connection with the said 4000 acre tract.

4. For answer to the 4th paragraph of the Bill Respondent *refers* that at the time and as a result of the negotiations described in the 2nd paragraph hereof, Hillary A. Herbert and Benjamin Micou, composing the partnership firm of Herbert & Micou, George C. Reid, Charles T. ——, one the defendants hereto, and Respondent, entered into an agreement which provided that they should organize a corporation with a capital stock of $150,000, divided into 150 shares
26 of the face value of $1000 each; that Respondent and Davis and Herbert & Micou should exercise the option referred to in the 2nd paragraph of this answer and acquire the 4000 acre tract of land which it covered; that said corporation should then purchase it from them for the sum of $25,000, and 40 per cent. or 60 shares of its capital stock; that the remaining 60 per cent. or 90 shares of its capital stock should be taken by the parties to the agreement at one-third of its face value or $30,000, of which sum $25,000 was to be applied to the purchase of the said 4000 acre tract of land, and the remainder, $5000, was to remain in the treasury of the company to meet operating expenses, and that said land when acquired by said corporation should be disposed of in lots of 10 acres or other size suitable for groves of oranges, lemons, grape-fruit or similar fruits. This agreement was not to go into effect until the parties to it had sent some one to Cuba to examine the land and investigate the title to it. If the title was found to be good and the land suitable for growing citrous fruits the agreement was to remain in force, otherwise it was to be of no effect.

And Respondent avers that L. G. Billings was not a party to this agreement and had no interest in it except that he had expressed a desire to share in the enterprise and it was understood among the parties to this agreement that if he so desired he should be allowed to take 6 of the remaining 90 shares as hereinbefore described upon the same terms as the parties to the agreement were to take this stock. And Respondent denies that any other person was a party to or had any interest in said agreement. And Respondent
27 further denies that anything in said agreement contained made his co-defendant Davis or himself trustees or agents for said corporation or made it their duty to sell said land to said corporation or to any other person at the same price they were to pay for it, and make no profit out of the transaction.

5. Respondent denies that shortly after making said agreement

described in the 4th paragraph hereof the said Reid and other prospective stockholders in said corporation sent Benjamin Micou to Cuba invested with power to act for them in completing the transaction provided for by said agreement, and Respondent denies that there were any such other prospective stockholders.

And Respondent avers that in the month of March after said agreement was made, said Reid and said Micou went to Cuba and Respondent and his co-defendant then made to them the representations set out in the 3rd paragraph of this answer in regard to the purchase of the additional tract adjoining the said 4000 acre tract; that Reid, Micou and Davis in company with a person selected by Reid, who was familiar with the values and uses of land in Cuba, went upon said land and made a thorough inspection of the said original and the said additional lands. Respondent avers that the person so selected by Reid to examine said land was theretofore unknown to him and to his co-defendant Davis, and he denies that said examination was made by persons secured or recommended by him or his said co-defendant.

Respondent avers that the widow Tarafa demanded the sum of
$9000 for the said original tract hereinbefore referred to and
28 that it was estimated to contain about 1000 acres; that after
the said examination of the land, the said Reid, Micou, for Herbert & Micou, Davis and Respondent entered into a new agreement modifying the old agreement by providing that they should purchase 5000 acres, more or less, the same being the tract of about 4000 acres referred to in their said first agreement, and the additional tract of about 1000 acres hereinbefore referred to, and should pay for these tracts the aggregate sum of $34,000, which sum should be paid one-half in cash and one-half in 12 months from the date of said agreement; that instead of Davis, Herbert & Micou and Respondent receiving 40 per cent. of 60 shares of the capital stock of the corporation, the said 60 shares should be equally divided between the parties to the agreement, Reid, Davis, Herbert & Micou, and Respondent, each receiving 15 shares; that the remaining 60 per cent. or 90 shares should be taken by the parties to the agreement as follows: Respondent 22 shares, Reid 25 shares, Micou 17 shares and Davis 10 shares, each of said parties agreeing to pay for the stock so taken by him such sum as would make all contribute in proportion to their holdings of the said 90 shares and would aggregate $39,000, of which $34,000 was to be applied to the purchase of the land and $5000 was to be held as an expense fund; that if the said L. G. Billings should not take the 6 shares provided for him as set out in the 4th paragraph of this answer, they should be taken by the parties to said agreement in proportion to their stock, and that said Micou should take the title to said land until said
company should be formed. And Respondent avers that
29 this agreement was carried out and the said tracts of land were
purchased as therein provided and the title to the same conveyed to said Micou.

Respondent avers that he and his co-defendant Davis introduced Micou and Reid to Claudio Gonzales de Mendoza and represented

him to be a Cuban lawyer of integrity and ability, and that said Mendoza at the request of all the parties to said agreement made an investigation of the titles of said land and advised and counseled them in regard to the transfer of the same to Micou. Respondent avers that said Mendoza before the transfer of said land to Micou reported to the parties to said agreement that there were three several incumbrances upon said tract of land in the form of what is known in Cuban law as "censos," which as Respondent is informed and believes, is a species of ground rent, the principal of which becomes due only at the option of the debtor who pays interest at the rate of 5 per cent. per annum; that one of these "censos" was for $1333 and encumbered a portion only of said tract of land; that another was for $900 and encumbered another portion; that another was for $5400 and encumbered this tract, and another much larger tract of which this had been a part when the "censo" was created; that when the original tract was divided, parties taking other portions of it had assumed the payment of the interest on this "censo" and that since that time no demand for the same had been made upon the owner of the Tarafa estate. Respondent further avers that said Mendoza advised that on account of the said last named "censo" it was desirable to have the title to said land conveyed to Micou
30 through some one other than the widow Tarafa and Respondent and his co-defendant Davis procured Gustavo E. Eschalante to take the title from the widow Tarafa and convey it to Micou. Respondent has no knowledge of any interest in said property which was vested in any minor children of the widow Tarafa and denies that he ever represented or procured any other person to represent to any one that on account of them it was necessary to have Eschalante to act as an intermediary in the transfer of said title. Respondent further avers that neither he nor his co-defendant Davis is a Cuban lawyer or in any way competent to pass upon the validity of a conveyance of or a title to land in Cuba, which fact was well known to both Reid and Micou; that they as well as the said Micou and Reid were obliged to rely entirely upon the advice of the said Mendoza; that said Mendoza is a Cuban lawyer of excellent reputation for integrity and professional skill and that they have no knowledge of any incumbrance on said land other than those hereinbefore described.

Respondent avers that after the discovery of the said "censo" of $5400, the owner of the property in consideration of the possibility of its becoming a charge upon said land, and the additional payment of $1000, agreed to add to the said tracts hereinbefore described another portion containing a lake and about 500 acres of land, and this agreement was accepted by the said Reid, Micou, Davis and Respondent, and the said addition was included in the said conveyance to Micou. Respondent avers that at the time of said conveyance neither he nor his co-defendant Davis nor
31 Reid nor Micou knew the exact number of acres in the tract conveyed and that each had the same opportunity to form an estimate of it, but since said conveyance said tract has been surveyed, and as Respondent is informed and believes, contains 5,558

acres. Respondent admits that all the purchase money provided by said agreements to be paid for said lands has been paid, but he does not know and can not say how much of these payments has been made by each of the respective parties to it.

6. Respondent admits the allegations of the 6th paragraph of the Bill except he denies that his co-defendant Davis at that time or at any other time with Respondent's knowledge and consent made any representation in regard to the title to said land.

7. Respondent avers that under the terms of their option contract he and his co-defendant David paid to the widow Tarafa the sum of $10,000 for the 4000 acres covered by said contract, and he avers that they spent in addition in procuring said option and selling said land about the sum of $3000, but Respondent again denies that he or his co-defendant ever represented to Reid, Herbert or Sowers that the land was to or had cost them any other sum, and Respondent denies that there ever has been any subscriber to the stock of said company other than Herbert & Micou, Reid, Davis and Respondent. And Respondent avers that the sums of $9000 and $1000 respectively were paid to the widow Tarafa to the 1st and 2d additions to said tract as hereinbefore described, and that all the parties to the agreement were fully apprised of this at the time it was done.

32 And respondent avers that the said L. G. Billings refused to take the 6 shares of stock provided for him as set out in the 4th and 5th paragraphs of this answer, and defendant Davis took the right to said shares of stock when they should be issued, with the understanding that if he could not sell them, the said Herbert and Micou, Reid and Respondent would share them with him; that Respondent is informed and believes and therefore states that the defendant Davis with the assistance of Reid and Micou subsequently sold the right to these shares of stock to Z. T. Sowers, but Respondent does not know the particulars of this transaction and can not answer concerning it.

Respondent denies that the said price of $35,000 was double the value of said land and he avers that at the time said land was conveyed to Micou it was worth a much larger sum and has ever since been and is now worth a much larger sum than $35,000.

Respondent denies that the expenses of the conveyance from Tarafa to Eschalante were paid by Complainant and he avers that the expenses of the conveyance from Eschalante to Micou including the examination of title, recordation, notary fees and other expenses were paid by the parties to said agreement, as they should have been.

And Respondent is advised that he has already hereinbefore sufficiently answered all the remaining allegations of the 7th paragraph of the Bill.

8. Respondent denies that he or his co-defendant Davis has been guilty of any inequitable conduct or are chargeable in favor

33 of complainant or any other person with any profits made in said transactions, and respondent avers that all of the contracts and transactions of himself and his co-defendant Davis with regard to the purchase of said land were with Reid and Herbert & Micou and none of them were with Complainant; that said transac-

tions were fully completed and the conveyance of said land was made to Micou and all the stock of said Company was provided to be taken by Reid, Herbert & Micou, Davis and Respondent before Complainant Corporation was brought into being.

And Respondent avers that after the charter of said Company was secured the said Reid obtained by purchases of stock which had been subscribed for by Respondent and Micou a majority of the shares thereof; that Respondent found the said Reid so arbitrary and unbusinesslike in the management of the affairs of said Company that Respondent determined to sell his interest in the same and has sold all of the stock taken by him except 7 shares, and Respondent avers that it is the purpose of the said Reid to drive him and the other stockholders out of the said Company and secure their holdings at the smallest possible price and that this bill is filed by him in furtherance of this evil design, and Respondent avers that said property is a very valuable one, capable of great development and *with* a much greater sum than was paid for it by said Company, and that it is solely due to misconduct on the part of the said Reid that the original project has not been carried to a successful termination.

And Respondent avers that in making this answer he does not waive the right given to him by the order of this court passed
34 in this cause on the 9th day of October, 1905, to renew his motion to strike the bill from the files and quash the writ of subpœna.

And Respondent is advised that he has already hereinbefore sufficiently answered all the remaining allegations of the 8th paragraph of the Bill.

And now having fully answered all the allegations of the Bill which he is advised are material and necessary to be answered, Respondent prays that he be hence dismissed with his reasonable costs in this behalf incurred.

CHAS. T. PHILLIPS,
Respondent.

SAM'L A. PUTMAN,
Solicitor for Defendant.

Joinder of Issue.

Filed November 18, 1905.

In the Supreme Court of the District of Columbia.

No. 25622, Equity Doc. —.

THE LAS OVAS COMPANY, INCORPORATED, a Body Corporate,
vs.
NORMAN H. DAVIS ET AL.

The complainant joins issue upon the answers of the defendants Norman H. Davis and Charles T. Phillips, in this cause filed.

J. J. DARLINGTON,
Solicitor for Complainant.

35 *Testimony on Behalf of Complainant.*

Filed January 23, 1907.

In the Supreme Court of the District of Columbia.

No. 25622, Equity Doc. 57.

THE LAS OVAS COMPANY, INCORPORATED, a Body Corporate,
vs.
NORMAN H. DAVIS ET AL.

Be it known that, at an examination of witnesses, begun and held on the twenty-fourth day of February, A. D., 1906, and continued by adjournment until the twenty-fourth day of March, A. D. 1906, personally appeared before me, the undersigned, an examiner in chancery, at No. 410 Fifth street northwest in the City of Washington in the District of Columbia, Gen. George C. Reid and Dr. Zachariah T. Sowers, both of lawful age, witnesses called to testify on behalf of the complainant in the above-entitled cause, when and where the depositions of said witnesses, hereto annexed, were by me taken down in shorthand, from the oral statements of said witnesses, made in answer to interrogatories and cross-interrogatories, propounded by counsel for the parties respectively, then and there attending, the said witnesses having been by me first duly sworn according to law; that said depositions were afterwards reduced to typewriting, were read over by said witnesses severally and were by them respectively subscribed in my presence.

I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

T. H. FITNAM,
Examiner in Chancery.

36 In the Supreme Court of the District of Columbia.

No. 25622, Equity Doc. 57.

THE LAS OVAS COMPANY, INCORPORATED, a Body Corporate,
vs.
NORMAN H. DAVIS ET AL.

Met, Saturday, February 24, 1906, at eleven o'clock a. m., No. 410 Fifth street northwest, pursuant to notice—present, Mr. J. J. Darlington, for complainant, and Mr. S. A. Putman, for defendant—whereupon, Dr. ZACHARIAH T. SOWERS, having been duly sworn, testified on behalf of the complainant as follows:

Dr. Zachariah T. Sowers.

Direct examination.

By Mr. DARLINGTON:

Q. Please state your full name? A. Zachariah T. Sowers.

Q. You are a member of the medical profession and have been for many years a resident of Washington, D. C. A. Yes, sir; since 1869.

Q. Do you know the defendant Norman H. Davis? A. Yes, sir.

Q. Please state when and under what circumstances you
37 met him? A. On the 12th of May, 1904, he came to my office with Mr. Micou; Mr. Micou was a patient of mine and brought Mr. Davis there because he was sick; I prescribed for him and he commenced a conversation about certain interests he had in Cuba and opportunities for making money there; I told him that I believed that as he thought there were great opportunities in Cuba for making money, if I could associate myself with some gentleman in the matter I would be more than happy to be a participant in making some money in Cuba. He said that he had a company I would be perfectly safe in connecting myself with and he thought I would make some money; I asked him of whom the company consisted and he said Colonel—now General—G. C. Reid, Messrs. Herbert & Micou, Phillips and himself; he said he had six shares of stock in that company that was formerly owned by Mr. Billings who was unable to pay for it and for that reason he had charge of the thing, that he had agreed with the company to take it up, and, if I wanted to, I could have that stock at the same price he gave and that was agreed to be given by Billings who failed to take it. He also said that this was the price that all the stock cost and I was on the same footing with all the rest of the company, namely, on the ground floor. I said "Mr. Davis, I have been in companies before and I have been informed that I was 'on the ground floor' but to my surprise and disgust it turned out that I was not, but in associating myself with a company of this kind and having the assurance from you that I am on the ground floor and taking my stock at the same price it cost everybody else I would be very glad to go in with you and take this stock." That was about the sum and total, I
38 think, of the conversation with Mr. Davis. The next morning he brought the stock to my office and told me the price of the land was Thirty-five thousand dollars ($35,000.00) and that there was Sixteen hundred dollars ($1600.00) for extra expenses independent of the land to be met proportionately. Those expenses were for different things; he had to pay somebody for helping to get the deal through, and other expenses outside of the price of the property, which the stockholders would bear. He made his calculation and regarding him as an honorable man, I having no opportunity of knowing whether he was making a proper calculation or not, let him make his calculation as to how much my proportion

would be, which he said would be $1,333.33; I drew my check and gave it to him and he turned over the six shares of stock.

Q. Is that the check (presenting paper to witness)? A. Yes, that is the check. .

Q. Did this check come back to you from your bank? A. Yes, sir; there is the bank's paying mark.

(Said check is offered in evidence, and the same is herewith filed, marked "Complainant's Exhibit A.")

Q. At either of these interviews did Mr. Davis make any statement to you as to the value of the land as compared with the $35,000.00 you paid for it? A. Yes, he said that the land was worth at least four times as much as we gave for it; he thought it could be readily sold at twenty dollars an acre and it cost us about five, I think; and I asked him how he managed to get hold
39 of such valuable property on such terms; he said it was owned by a widow named Tarafa and that she had to mortgage it, and, having nothing but the land, she had to have some cash, and for this reason had sold this part of her estate.

Q. Mr. Davis, in his answer, claims that he told you the stock was being sold to you at some advance: What is the fact about that? A. The facts are he told me repeatedly—I made him repeat it several times—that I was on the same footing with everybody else in this company; I had given the same price that everybody else had given and exactly the same price that the stock had cost him. The reason I did——

(Mr. PUTNAM: I object to the witness stating his reason.)

WITNESS: I had been fooled in other transactions with other companies and I was very much more guarded in this than I would otherwise have been.

Q. What part, if any, had Gen. Reid in causing you to purchase this stock? A. None whatever. I knew nothing from him of his connection until after I bought it; I knew Reid and I knew his general reputation as a man of business and honor, and his connection with the company was one of the inducements to me to go into the company: That is all the connection he had with my purchase.

Q. What conversation of any kind—if any—ever passed between Gen. Reid and yourself in regard to the matter before you had purchased and paid for the stock? A. None whatever. If I had
40 talked with him about it I would have asked what the stock had cost.

Q. Do you know the defendant Phillips? A. Yes, sir; I met him after that on several occasions.

Q. Do you recall whether he made any statement to you in regard to this land purchase? A. Yes, he said he thought I was very fortunate in getting such an opportunity to make money; that we had a most valuable tract of land at a very low price, and that it was worth several times what we gave for it.

Q. What information if any was given you by either Mr. Davis or Mr. Phillips that less than $35,000.00 was paid to the widow Tarafa for this land? A. None whatever. When I made the pur-

chase I asked Davis "Is that the lowest we can get this property for?" He said "It is the very lowest possible price and we are most fortunate in getting it on such terms." I made this inquiry because I wanted to guard against any possible——

(Mr. PUTNAM: I object to witness' reasons.)

Cross-examination.

By Mr. PUTNAM:

X Q. How long had you known Gen. Reid before this interview you had with Mr. Davis and Mr. Micou? A. Quite a number of years.

X Q. Was your acquaintance with him intimate? A. Quite so.

X Q. Did Mr. Davis inform you at this first interview that
41 Gen. Reid was in the company? A. Yes, and all the other members of the company.

X Q. Who else did he say was in the company? A. He said Herbert and Micou,—both of whom were patients of mine, Gen. Reid, Phillips and Davis constituting the company; and this man Billings was until he failed to pay for the stock. That was his statemen to me.

X Q. That had occurred at your first interview with Davis? A. Yes, that is what he stated at our first interview.

X Q. You say Davis told you at that interview that the land had cost the company $35,000.00? A. Yes, sir. And this extra sixteen hundred dollars, which would have to be divided up pro rata among the stock.

X Q. When did you first speak to Gen. Reid about your having any trade with Davis? A. I don't know.

X Q. How soon after? A. It could not have been very long; probably ten days or two weeks; the first time I met him I told him I had gone into the company with which he was connected.

X Q. Did you tell him the terms upon which you had gotten into the company? A. No, I told him I had gotten in on the same terms the rest of them had; that Davis had kindly let me have the six shares of stock that Billings had failed to take, on the same terms that Billings had purchased.

X Q. Did Gen. Reid then tell you you went in on the same terms as other people? A. No, I didn't discuss that; I took it as a
42 matter of fact; I never thought anything else; he did not ask me what the check was; he did not know what I had paid though he must have known what Billings paid and probably it didn't occur to him to ask any such question.

(Mr. PUTNAM: I object to what he must have known, and what probably occurred to him.)

X Q. Has Gen. Reid ever told you that he knew of a different basis from this? A. I found it out by inquiring of Gen. Reid and of the secretary of the board and other holders of stock; I think, Col. Herbert and other different members and from what other stock cost. The first intimation I ever had of it was the secretary said "I have your check here, the amount of your check——

(Mr. PUTNAM: I object that this is some months after this transaction; as well as the expressions 'I found you paid more than anybody else for this stock;' 'this is the first intimation I had,' &c.")

WITNESS: Then after that I made inquiries and it was a fact.

X Q. Who are the individuals composing the firm of Herbert & Micou? A. Herbert & Micou.

X Q. Well, what Herbert? A. Hilary A. Herbert. He is the father in law of Micou; Benjamin Micou.

X Q. Where are Hilary A. Herbert and Benjamin Micou now? A. The office is 1419 G street northwest, this city.

X Q. Do you know whether they are in the city now or not? A. The Colonel is but Micou is down in Louisiana.

43 X Q. Is Micou permanently or temporarily absent from the city?

(Mr. DARLINGTON: I object that the testimony is not responsive to any part of the direct testimony of this witness; and is further more incompetent and immaterial to any issue in the case.)

A. I presume, temporarily, as near as I can get at it. I sent Mrs. Micou off for her holiday, and he went down with her.

X Q. Was Micou present at all of the first interview you had with Davis? A. Yes, all of the first interview I had; but not at the second.

X Q. He heard the entire conversation between you and Davis at the first interview? A. Yes, sir.

A. Did Micou make any suggestion himself? A. Not at all; he did not say anything; he made no remarks whatever.

X Q. Doctor, had the company been organized at the time of your purchase of this stock? A. No, it was organized afterwards.

X Q. You say that Davis brought you the stock at the second interview? A. On the morning of the 13th.

X Q. Have you that stock now? A. Yes, sir; very safely guarded in my safe deposit box. The second interview was on the day this check was drawn, the 13th inst.

44 X Q. You mean to say that the check was issued before the company was formed? A. It was in the form of a certificate of stock.

X Q. Whom was it signed by?

(Mr. DARLINGTON: I object; the stock itself is the best evidence.)

X Q. You describe an interview with Phillips; who was present at that interview besides yourself and Phillips? A. I would meet him at the stockholders' meetings at different times; there was no particular effort on my part to meet him; we would just meet at these meetings of the stockholders.

X Q. State as near as you can the exact time you first learned that Davis had not sold you the stock on the same basis as the other stockholders? A. I can't state exactly the date as I can this check which I have in my possession; but it must have been several months after my purchase.

X Q. Name as near as you can the month and year? A. That is as near as I can get it.

X Q. How did you first learn it? A. By the allusion of the secretary to the fact that the amount recorded against me on the books of the company showed that I had paid more for the stock than anybody else.

X Q. Who was that secretary? A. A man named Kane, who is now one of the stockholders—I don't know his initials.

X Q. Do you mean he was secretary of the Las Ovas cor-
45 poration? A. He was acting as secretary; Gen. Reid was the real secretary; this was his assistant or clerk; he kept the records and I made inquiries after that and found out and was very much disgusted at having found out this imposition.

X Q. What was it you said if Davis had told you it would cost you a little more. A. If Davis had told me it would cost me a little more I would not have objected at all, because I was a new man and somebody else had done all the preliminary work and it was no more than fair that I should pay more—a small amount.

X Q. Had the corporation been organized when you found that out? A. Yes, it was organized a few days after the purchase.

X Q. What are your present relations with Herbert & Macou, as to friendship?

(Mr. DARLINGTON: I object to the question on the ground that such relations do not bear upon any issue in the cause and are not responsive to the direct examination.)

A. Our relations are most friendly; I am the physician of both of them and their families.

X Q. Where is Gen. Reid? A. I understand he is in Cuba.

X Q. Do you know when he went from here to Cuba? A. Sometime, I think in the early part of the month.

Redirect examination.

By Mr. DARLINGTON:

Q. What knowledge did you have of Mr. Phillips at the
46 time you purchased that stock? A. None whatever. I heard of him first from Mr. Davis mentioning him as one of the members of the company.

ZACHARIAH T. SOWERS.

Sworn to before me as aforesaid, and subscribed this 3d day of April, A. D., 1906.

T. H. FITNAM, *Examiner.*

47 Met, Saturday, March 24, 1906, at 2:30 o'clock p. m., 410 Fifth street northwest, pursuant to arrangement between counsel, made since adjournment—present, Mr. J. J. Darlington, for complainant, and Messrs. S. A. Putman and J. K. M. Norton, for defendants—whereupon, Gen GEORGE C. REID, having been duly sworn, testified on behalf of complainant as follows:

Gen. George C. Reid.

Direct examination.

By Mr. DARLINGTON:

Q. State your full name? A. George C. Reid.

Q. What is your occupation? A. Brigadier General United States Marine Corps, retired.

Q. What is your connection with the complainant, the Las Ovas Company? A. I am secretary and treasurer.

Q. When and through whom did you first hear of this property in Cuba, described in the bill? A. From Mr. Davis and Mr. Phillips. I might say that Mr. Micou mentioned to me that Davis and Phillips had this property—had an option on it.

Q. When was this? A. It was about the first of February or the last of January; or early in February, 1904.

Q. At that time had you any previous acquaintance with
48 Davis and Phillips? A. I had never seen Mr. Davis before, but I had seen Mr. Phillips about a year before.

Q. Where did you meet Davis and Phillips in this connection? A. I think I met them at the office of Herbert and Micou.

Q. At whose instance? A. Mr. Micou telephoned to me at my house that they were there, and I finally went down; I recalled then that I had met Mr. Phillips before.

Q. When you met them on this occasion, please state concisely but fully what occurred? A. They mentioned that they had an option on certain land in Pinar del Rio, in Cuba and proposed the forming of a stock company for the purchase of said lands and selling off the same for the purpose of citrous fruit raising.

Q. Did they state from whom they had this option? A. They stated it was from Madam Acosta, the widow of one Tarafa.

Q. At what price did they state they had this option? A. Their first statement was it covered 4,000 acres at a price of $25,000.00.

Q. What, if any, compensation or profit to themselves different from what the other investors should have did they mention? A. They as promoters were to have a certain proportion of sixty shares of promoters' stock.

Q. There were to be sixty shares of promoters' stock and
49 they were to have a portion thereof? A. Yes, sir.

Q. Who was to have the other part of the sixty shares? A. Herbert and Mocou.

Q. What profit, if any, other than their shares in this corporation did they tell you they were to make out of the transaction? A. Nothing.

Q. I mean, what profit other than the other shareholders were to share? A. Nothing other.

Q. Were any papers given you by either Mr. Davis or Mr. Phillips at or about that time? A. Yes, I think Mr. Phillips gave a copy of a first agreement, and a memorandum regarding the proposed company after it was formed.

Q. Please look at the papers which I now hand you and state whether they are the papers which they gave you? —. (Witness looking at papers): This here is one of them.

Q. Do you mean the paper, "Proposition for the Formation of a Company, etc.?" Yes, sir.

Q. And that other paper is the one you refer to, the one headed, "This memorandum of agreement, etc.?" A. Yes, sir.

Q. I observe each of these papers to have some penciled notation at top of it: Was that there when Mr. Phillips gave them to you? A. No, sir.

50 Q. Do you know in whose handwriting this penciled notation is? A. It is in the handwriting of my clerk, Francis A. Kane.

(Mr. DARLINGTON: I offer these two papers in evidence, and ask the examiner to mark the same, "Complainant's Exhibits," Nos. 1 and 2, respectively;" which is done, and the same are herewith filed.)

Q. Now, Gen. Reid, please proceed and state concisely and fully what further took place between you and these parties in connection with this matter? A. There were a number of meetings took place, mostly at the rooms of Phillips and Davis, at the New Willard Hotel in this city. During these meetings, it was decided that the proposed stockholders should select a person to go to Cuba, examine the land and the title thereto, and, if everything was found satisfactory, they were to purchase five thousand acres.

Q. At what price? A. Thirty-four thousand dollars ($34,000.00).

Q. What representation, if any, was made to you as to who would get the $34,000.00? A. It was represented to me that the persons holding the ninety thousand (90,000) shares of non promoter stock should pay the $34,000.00 to the vendors of the property.

(Mr. PUTMAN: Defendants object to the witness' statement that it was represented to him unless he states who represented it to him and unless he states what was said by the person so representing.)

Q. Please tells us who made these representations? A. They were made by both Mr. Phillips and Mr. Davis. They said they
51 had an option from Madam Acosta to purchase this land at that price.

Q. Please tell us what followed this tentative agreement of which you have spoken? A. Mr. Micou was designated by the proposed stockholders to go to Cuba, examine the land and the title thereto.

(Mr. PUTMAN: Defendants object to statement that Micou was designated by the proposed stockholders unless witness states who the proposed stockholders were.

(Mr. DARLINGTON: I would suggest to counsel that they will have the fullest opportunity to cross-examine witness on these points and their present objections are simply in the line of anticipating questions which counsel for complainant proposes to ask.)

Q. Who, General, were the stockholders who made this selection?

A. Messrs. Phillips, Davis, myself and Paymaster Billings of the Navy.

Q. What followed? A. It followed that Mr. Micou and myself went to Havana, and in company with Mr. Davis and a man named Howard, a man named Townes; and another person who, I think was employed on the place, or a tenant on the Las Ovas property, took us, Davis, Howard, Townes, Micou and myself, to Las Ovas in the province of Pinar del Rio.

Q. When and how did you become acquainted with Howard and Townes? A. I met Towns at Mr. Davis' office; and I met Howard at an orange plantation ten or twelve miles from Havana.

Q. How did you happen to be out at this orange planta-
52 tion? A. Mr. Davis took the Siamese minister, my son, Mr. Micou and myself out to see the orange plantation.

Q. When you got there who introduced you to Mr. Howard? A. We were driven through the plantation when we came across two men budding orange trees. Mr. Davis went to them and spoke to them, then called me over to where they worked and introduced me to them.

Q. How and when did you form acquaintance with Mr. Townes. A. At Mr. Davis' office.

Q. On the same visit to Cuba? A. On the same visit to Cuba, and prior to the visit to the orange plantation I mentioned.

Q. At whose instance or suggestion was it that Townes and Howard were taken with you to see the land? A. Mr. Davis requested Mr. Townes to go, and asked me if I would like Howard to go, and I said I would.

Q. Is there anything in connection with that visit to the land which you desire to state? A. Only that at Las Ovas we met one of the principal men of the plantation with horses and we rode the entire day, until seven o'clock in the evening over the Las Ovas plantation and then went to the hotel and stayed that night.

Q. Then what followed? A. We came back the following day to Havana; I remained in Havana a day or two after that and then went on to Guantanamo. After coming back from Pinar del Rio to
53 Havana and before my departure for Guantanamo had a meeting with Phillips, Davis, Micou and myself at my rooms at the Villa de Hermosa. It was decided that I should have an equal share of the promoters' stock with the others and we would purchase the five thousand acres of land for $34,000.00. I made out my check for my proportion of the first payment, $6,611.15 and gave it to Mr. Micou with instructions that if he found the title clear and everything satisfactory he was to pay that amount to the company as my share of the purchase money.

Q. What share of the non promoter stock were you to get? A. Thirty-five shares out of ninety.

Q. And this check for $6,611 and some cents was—— A. One-half of the purchase price—one half of my share of the purchase price of the property.

Q. What was the occasion of your going to Cuba at that time? A. I was in contemplation of an inspection trip to Guantanamo.

Q. In what capacity? A. As inspector of the Marine Corps, to inspect a battalion of marines which was stationed there, and to make an examination with a view to the location of a marine barrack at that station. When I found that Mr. Micou was going down for the purpose of examining and inspecting the title to the land, its quality, &c., I asked our commandant to make my order so as to make it possible for me to go along with Mr. Micou; that is, to make my orders as of a date which would be convenient to Mr. Micou.

54 Q. On returning from Guantanamo what did you find the condition of affairs to be? A. On returning from Guantanamo to Havana I found that Mr. Micou had returned to the United States a couple of days previous. I saw Mr. Davis and asked him if Mr. Micou had found everything all right as to the title to the land, and if there were any encumbrances on the land. He said he found the title all right; that there was only one little censo on certain portions of the land; that a censo after running thirty years without any attempt to clear it was outlawed, and this had run for about forty-one years.

Q. What if anything did he tell you Mr. Micou had done in the way of securing the land during your absence in Guantanamo? A. He said he had examined the title and had paid into the company my half the payment on the first half of the purchase money.

Q. What if anything did he tell you about the land having been conveyed, or deeds made to it? A. He said Mr. Micou had received the deed for it. He also told me that during my absence he had secured an option from Madam Acosta for one thousand acres additional, which included the lake lying immediately south of our five-thousand acre southern boundary; that if the company did not want this one thousand acres he would take it himself. I told him the company should have an opportunity to take it if it wished, and I would like to lay the matter before the company when I got to Washington.

55 Q. At what price did he say this additional thousand acres could be purchased? A. At one thousand dollars.

Q. What acquaintance, if you know, did Mr. Micou have with the Spanish language, or the Spanish laws, or the methods of the examination of titles in Cuba? A. Little or no acquaintance with the Spanish language; what acquaintance he had with the Spanish laws or the method of conveying titles I don't know.

Q. Do you know what instrumentalities were employed to examine the title, and at whose instance they were selected? A. Of my own knowledge I do not know. I was not there at the time; at Guantanamo at the time the title was examined.

Q. Did you afterwards receive any information on the subject from Mr. Davis or Mr. Phillips? A. Yes, I heard Mr. Davis say that Mr. Micou had selected Mr. Mendoza, a prominent lawyer in Cuba.

Q. Did he say at whose instance or recommendation he had selected Mr. Mendoza? A. I don't remember that.

Q. What became of this option on the purchase of the additional thousand acres including the lake. A. The proposed stockholders

said they would take it, and did take it, and paid their proportion of the one thousand dollars in proportion to their shares.

Q. Do you recall how much you paid upon that purchase? A. I paid to Mr. Davis $194.00, and some cents, as the first half of my share.

56 Q. And when was this payment made? A. This payment was made, to the best of my recollection, the early part of June, 1904.

Q. When did you leave Cuba after finding Mr. Micou had already gone, as you have already stated? A. I left Cuba the latter part of March; I think, between the 26th and the first of April.

Q. 1904? A. 1904.

Q. You have stated that you paid one-half of the purchase money: When was the other half to be paid? A. The other half was to be paid in a year from the 25th of March, 1904.

Q. Please state when, if at all, the proposed corporation was organized? A. Application was made for incorporation in May, 1904; we received a certificate of incorporation in the early part of June, 1904.

Q. In the meantime who held the title to the land? A. Mr. Micou held it for the company.

Q. After the incorporation of the company what was done in the matter of the title? A. After the incorporation of the company Mr. Micou transferred the title to the land to the company.

Q. Please tell us then what followed? A. There were numerous meetings of the board of directors and the general manager.

Q. I don't care so much about that; but to get down to this controversy; what can you tell us about the company's getting possession of the deed to Mr. Micou? —. In January, 1905, as

57 the company had not received any deed to the property after they had written to Mr. Davis about it several times, and becoming somewhat anxious, I myself on my own account went to Havana and told Mr. Davis that I had come for the purpose of getting the deed; that our directors wanted to see the deed, to examine it. He told me that he had given the deed to Mr. Micou to take with him to Washington; when I told him he was mistaken; that Micou said he had not gotten the deed and that the deed had to remain in the archives of the Cuban government, he insisted very strongly still that he had given it to Mr. Micou and, if not to Mr. Micou, then to Mr. Phillips.

Q. Where was Mr. Phillips at this time? A. He was then in the United States.

Q. Proceed, please? A. Mr. Davis and myself had several engagements to go to Mr. Areallano's, but Mr. Davis, for one reason or another, was unable to keep these engagements, and, as it was coming about time for me to leave for the United States, I went myself to see Mr. Areallano and asked him if he could tell me what had become of the deed to the property.

(Mr. PUTMAN: We object to any conversation that took place between witness and Mr. Areallano, and move to strike out the conversation.)

Q. Proceed, General. A. Mr. Areallano took down a book and showed an entry in the book where he had delivered the deeds from Mr. Escalante to Mr. Micou and Mr. Micou to the company, to Mr. Davis the previous November.

(Mr. PUTMAN: We object to the answer for the same
58 reason and move to strike it out; and for the further reason that the record is not produced.

(Mr. DARLINGTON: The record is out of the jurisdiction.)

WITNESS: Just at that moment Mr. Davis himself came into the office.

(It is stipulated by and between counsel that the foregoing objection shall apply to all further testimony of a similar character by the witness without being reiterated.)

Q. Proceed, General. A. About this time Mr. Davis came in Mr. Areallano's office and I said to him, "Mr. Davis, you have those deeds;" he said, no, he had not; then Mr. Areallano showed Mr. Davis the same entry in this book, that he had given him the deeds in November. Mr. Davis then expressed his surprise and said they must be in his office. We went together to his office and he made an examination of the papers in his desk and found the deed from Escalante to Mr. Micou and from Mr. Micou to the company. I took these papers, and, together with Mr. Davis, went back to Mr. Areallano's office and instructed him to have them sent to the Registrar in Pinar del Rio.

Q. That was the province in which the land was located? A. That was the province in which the land was located, and it is a city also. I took a receipt from Mr. Areallano for the two deeds, as also for the necessary amount of money to pay the dues and expenses to be incurred on account of the registration and some back charges that had been incurred and not paid at the time Mr. Micou was in Havana. I instructed Mr. Areallano to have these papers put through as soon as possible; that the time for making
59 the last payment on the land was drawing near and that the directors were not disposed to make any further payments until they had possession of those deeds.

Q. Was Mr. Davis present when you gave those instructions? A. He was. Mr. Areallano said he would forward the papers at once to the Registrar in Pina- del Rio; that the Registrar had a right to take fifteen days in which to do the work of registration and that if he were requested to do this work in a shorter time said Registrar might demand extra payment for the work. At the expiration of fifteen days Mr. Areallano would have the deeds back and would forward them at once to the company in Washington. Then I came back to Washington, and some considerable time having elapsed without our receiving the deeds, I wrote to Mr. Davis and to Mr. Areallano urging that they should be forwarded without delay. Mr. Davis informed me that Mr. Areallano had been sick as a reason he had not sent them.

Q. Was that by letter? A. That was by letter, and verbally, too.

Q. Have you the letter; if so, will you produce it before signing

this deposition? A. Yes, I will; I am under the impression it is in the hands of Messrs. Runcie and Lamar, in Havana; they are the Cuban attorneys of the Las Ovas Company. Mr. Areallano informed me——

Q. One moment; by letter? A. By letter, and verbally, when I asked.

60 Q. Have you his letter? A. I am under the same impression regarding that; but I can ascertain as soon as I go home.

Q. If you find the letter will you produce it before you sign your deposition? A. Yes, sir. He informed me that I had not given him sufficient money to pay all the expenses attendant upon the registration of the deeds; and, this afterwards becoming known to the board of directors of the Las Ovas Company, they had a meeting of the board about the first of March, 1905, and directed me as secretary and treasurer to go to Havana and secure these deeds, at the same time authorizing me to employ counsel there if I deemed it necessary. I went to Havana arriving there on Saturday and the following Monday——

Q. What month? A. Saturday, early in March, 1905.

Q. When was the second payment due? A. The second payment was due the 25th of March, 1905. I found that the deeds had been sent to Pinar del Rio about the day I left Washington for Havana. The Monday following my arrival in Havana, Mr. Davis and myself went to Pinar del Rio and got these deeds. We saw the Registrar in his office; we got the deeds, and I took them back to Havana and took them to the company's attorneys Messrs. Runcie & Lamar.

Q. Then what happened? A. It was then that Major Runcie, the attorney who speaks Spanish, examined the deeds, translating them to me as he read them over, into English; and it was then that I first learned that the property had been purchased

61 from Madam Acosta by Mr. Escalante.

Q. Where was Mr. Davis when this translation by Major Runcie was made? A. He was present.

Q. What followed? A. Major Runcie said to Mr. Davis, "I want the other deed;" or words to that effect. That is, the deed from Madam Acosta to Escalante; "I cannot give my clients an opinion as to the title to this property until I have examined that deed."

(Judge NORTON: The above conversation is objected to as in no way affecting the original contract between the defendants and other parties, as related in the bill; and as an indirect way of getting hearsay testimony on the record.)

Q. Proceed, please? A. Whether on that same day or the day following I don't remember but Mr. Davis did get the deed that Major Runcie referred to, and Major Runcie translated this deed in the presence of Mr. Davis and me. It was then that I first learned that the price to Madam Acosta for the property as it was recited in that deed was $20,000.00. When the price paid, $20,000.00, was

read out by Major Runcie, Mr. Davis explained that that was not the real price, but was so entered by Mr. Areallano for the purpose of reducing the amount of transfer tax to be paid the government.

Q. What explanation did they give you of there being a conveyance to Escalante at all, instead of the property being conveyed directly to Mr. Micou from Madam Acosta? A. Mr. Davis had said to me on my return from Guantanamo to Havana,
62 heretofore mentioned, that as Madam Acosta had given an interest of some description in that property we were to purchase to her daughters, and as according to the laws of Cuba these daughters could not transfer back to their mother said interest, it became necessary for them to make a deed of their interest to some outside party, and for this reason their interest had been deeded to Escalante.

(Judge NORTON: The last objection and motion repeated.)

Q. Returning now to the original negotiation between Messrs. Davis, Phillips and yourself, what statement, if any, did they make to you as to the value of the 4,000 acres as compared with the $25,000.00 you were to pay for it? A. They made frequent representations during the time we were associated that the value of the land was very much greater than the price we were paying for it.

Q. What explanation did they give of their ability to get the land for less than its worth? A. Mr. Davis told me that Madam Acosta was rich in land but she was very poor in money, and that she was obliged to sell the land to get money to support herself and family.

Q. Defendants urge in their answer that the examination of the land of which purchase was made, was by persons procured by you, being unknown to Messrs. Davis and Phillips: What have you to say to that? A. I had not seen Howard prior to the day we visited the orange plantation, as I have stated. I had never seen Townes until a day or two prior to our visit to the land, as stated, and had no acquaintance with them at all.

63 Q. Through whom did you meet these men and by whom were you introduced to them? A. To both of them by Mr. Davis in his office in Havana.

Q. Both of them? A. To Mr. Townes at his office in Havana and to Mr. Howard on the orange plantation to which Mr. Davis had taken me. There was a previous inspection of the land by a land expert employed by Mr. Davis.

Q. Who was he? A. Mr. Bullard, I think he was. He paid him $100.00 or so for making that examination.

Q. Had you ever met this Mr. Bullard prior to his inspection? A. No, sir.

Q. Did you know anything about him prior to his inspection? A. I don't think I ever saw him, before or since.

Q. The answer states that the title examination was made by Mr. Mendoza at the request of the parties; what connection had you with this request? A. None whatever.

64 Q. The answers further state that Mendoza reported the state of the title to the parties—— A. Allow me to state

that I was not in Havana but had gone to Guantanamo when Mr. Mendoza examined the title.

Q. The answers further state that Mendoze reported to the parties to the agreement that there were three censos. Please state whether such report was made to you. A. No.

Q. The answers further state that, after the discovery of the censos, the widow Tarafa agreed, in consideration of their possibly becoming a charge, and of another $1,000, to add a lake and 500 acres. Please give us what information you can in regard to that statement. A. I can give you none.

Q. When did you first hear that the widow Tarafa proposed to give this additional 500 acres and the lake because of the discovered censos? A. When Runcie translated to me the deeds, as I have stated, the third time that I went down.

Q. Is it mentioned in one of the deeds that on account of the land falling short Escalante had made Tarafa give the additional land? A. Yes. We always speak of him as Tarafa because Tarafa was the son of the owner of the property—that he had made the owner give an additional 500 acres on account of shortage in the amount that they were selling us, as I remember.

Q. That was read to you from some paper by Major Runcie, was it? A. Yes, it was read to me by Major Runcie.

Q. When was that? A. That was in March, 1905, when I went down to make the final payment on the land.

Q. The answers claim that either you or Mr. Micou told Mr. Davis that you had gotton Dr. Sowers interested and suggested Davis should try to sell him the Billings shares, which Davis did, with the assistance of Micou and yourself. Please tell us what your connection with the sale to Sowers was. A. I had no connection with it whatever; did not suggest it to Mr. Davis; did not assist in any way.

65

Q. When did you first learn that these shares had been sold to Sowers? A. Mr. Davis told me directly after he had sold them to Sowers, because we had to make out the certificate to Sowers. I, as Secretary, had to make out a stock certificate.

Q. Do I understand that you knew nothing of the sale until after it had been completed? A. I did not.

Q. When did you first learn at what price the Billings shares had been sold to Sowers?

Mr. PUTMAN: Question objected to.

A. It was a considerable time after the sale had taken place, but I cannot say how long.

Cross-examination by Mr. PUTMAN:

Q. General, at the time this suit was brought who were the officers and directors of the Las Ovas Company?

Mr. DARLINGTON: Question objected to as not being responsive to the examination. Notice is given that counsel is making the witness their own on this point. I have no objection to the General's being fully examined on this subject with this understanding.

A. Who were the officers and directors?

Q. Yes, at the time this suit was brought. A. Mr. Herbert was president, Mr. Davis vice-president, I was secretary and Treasurer, Dr. Sowers was a director. All the officers were directors also. Mr. Kane was a director.

66 Mr. DARLINGTON: You mean at the time suit was actually brought, or when it was authorized?

Mr. PUTNAM: At the time it was authorized.

A. I think my son was a director at the time it was authorized.

Q. Has that board of directors and officers been changed since that time? A. It was changed in February last at a meeting of the stockholders in Alexandria.

Q. What change was made? A. Dr. Sowers was made vice-president in place of Mr. Davis.

Q. When was this suit authorized? A. I have a little memorandum in my pocket; if I can look at it I can tell you,—but I can give it without that, to the best of my recollection.

Q. You may refer to the memorandum; I have no objection. A. On May 23, 1905, the Board of directors authorized the secretary and treasurer to employ an attorney and if necessary bring suit.

Q. What directors were present at that meeting? A. Reid, Sowers, Conrad Reid and Mr. Kane. Mr. Herbert was not present.

Q. Was there any later authorization? A. Yes.

Q. Tell us when that was. A. On June 28, 1905 at a meeting of the Board of directors a resolution was adopted directing the secretary and treasurer to employ J. J. Darlington as attorney to act to connection with Runcie and Lamar to take such action as they might deem necessary to recover any losses in connection with the purchase of the Las Ovas property. There was present Mr. Herbert, myself, Dr. Sowers and Mr. Kane.

67 Q. Did Mr. Kane and Mr. Conrad Reid own any stock? A. One share each.

Q. Where did they get that stock? A. I gave it to them.

Q. Was that a regular meeting or a called meeting of the board of directors—the last one? A. I think it was a called meeting.

Q. A called meeting? A. I think so.

Mr. DARLINGTON: I object to this as an incompetent method of proving the facts, the records being the only competent evidence.

Q. You answered it was a called meeting? A. I think it was.

Q. Did Mr. Davis have any notice of that meeting? A. I cannot say; I do not remember.

Q. Mr. Micou—was he present at either of these meetings? A. No. I read who was present; I will read it again.

Q. Yes. A. No, Mr. Micou's name is not given as one present. I do not think he was a director.

Q. Were all the directors who were present at that meeting—the last meeting mentioned—in favor of bringing this suit? A. Yes, without exception.

Q. Where is Mr. Hebert, now? A. Well, I saw him yesterday afternoon, at the Metropolitan Club, of Washington.

Q. Where is Mr. Micou? A. I saw him a few days ago at the office of Herbert and Micou.

68 Q. What are your relations with Herbert and Micou in a friendly way? A. We have been close and intimate friends for at least twenty-five years, and I highly esteem them.

Q. General, did you swear to the bill that was filed in this case? A. I think I did.

Q. Don't you know whether you did or not? A. Yes.

Q. You say that the first time you met Davis and Phillips you met them at Micou's office, on the invitation of Micou? Was Micou present during the entire conversation? A. Yes, he was—whatever conversation took place. My recollection is that we went from Micou's office down to the rooms of Davis and Phillips at the New Willard Hotel.

Q. But Micou went with you? A. Yes.

Q. At this interview Phillips and Davis told you about the Las Ovas property? A. Yes, at the first interview I had with them.

Q. Did Micou give you any information on the subject? A. I think the only information was that given me when he called me up on the telephone, that Phillips (recalling him to my memory as one whom I had met a year or two before) and Davis—I do not know whether he mentioned Davis by name or not—were there, and would I like to come down and meet them, or would I come down and meet them, I don't remember exactly the words, and he said that they had some proposition which he would like me to hear.

Q. Was Billings present at that interview? A. No.

Q. You have testified to subsequent interviews with Davis and Phillips during that visit of theirs to Washington. Was

69 Micou present at all of these subsequent interviews? A. I cannot say whether Micou was present at all of them, but we used to go together and meet at the rooms of Davis and Phillips. Often we would go to lunch with them, and we would go in the evening, and sometimes in the afternoon, and my impression is that he was present at all the interviews that I had with Davis and Phillips, or that we had together.

Q. When did Billings come into the negotiation? A. Billings came into the negotiation among the first.

Q. I am talking about as to time. A. Well, it was very shortly after, if not the same time, I did.

Q. Is he the only person besides you and Davis and Phillips and Herbert and Micou that did come in at that time? A. Yes.

Q. Then he came in among the last. A. Well, Sowers came in last. I mean he was in the preliminary talks.

Q. Was Sowers a party to that first agreement that you have exhibited here? Sowers did not come in until after the purchase of the property was completed, did he? A. Yes, the purchase of the property was completed and the deed drawn before he came in.

Q. Now, after you had entered into that contract which you have

exhibited here (I think it is Exhibit No. 2) you testified that you met at Phillips and Davis' rooms and agreed to appoint Micou as an agent to go to Cuba and made investigation of the proposition. Is that a fact? A. Yes.

Q. I believe you testified that you and Davis and Phillips and Billings and Herbert and Micou were the only people
70 at that time interested? A. I think that is all.

Q. When you say in the bill here "George C. Reid, Hillary A. Herbert and L. G. Billings and other persons consented to join the defendant company," who do you mean by "other persons?" A. I do not know.

Mr. DARLINGTON: I do not think that counsel can ask that question in good faith, as he did not draw the bill.

Mr. PUTMAN: He furnished the information for drawing it.

Q. You furnished the information upon which this bill was drawn, didn't you? A. The Las Ovas Company furnished it, through me.

Q. You furnished the information on which the statement was based that George C. Reid, Hillary A. Herbert, and Billings and other persons consented to join in the enterprise, did you not? A. Davis and Phillips were the other persons who consented to join the said defendants in the enterprise. The persons interested in the enterprise at that time were Hillary A. Herbert, Micou, Davis, Phillips, Billings and myself.

Q. In the second paragraph of the bill you say that the defendants reported to George C. Reid, Hillary A. Herbert, L. G. Billings and other persons that they, in conjunction with sundry other persons, had secured this option. Who were the sundry other persons? A. Did you mention Billings?

Q. Yes. A. Dr. Sowers was the only other one interested that I know of.

Q. He was not in the trade when it was consummated, so that at the time the trade was consummated there were no
70½ sundry other persons? A. I have given the names of the only ones that I know.

Q. You say that the defendants, alone or in conjunction with other parties—you say that defendants represent that they, in conjunction with other parties, had secured this option?

Mr. DARLINGTON: I object to the question, as the written papers filed herein, prepared by Phillips answer the question, claiming that he, Davis, Herbert and Micou had the option.

Q. Who were the other persons? A. With Davis and Phillips?

Q. Yes. A. Herbert and Micou.

Q. Afterwards you and the persons with you at the rooms of Davis and Phillips appointed Micou as an agent to go to Cuba, did he go? A. He did.

Q. In that capacity? A. That is my understanding of it.

Q. Why did you go, yourself? A. I had intended to make an official trip, and as I was advised that Micou was to go down, I

made it convenient to go on my official trip at the same time he went.

Q. Then you did go with him and inspected the ground? A. Yes, we rode over the ground together.

Q. You testified that this first agreement which you exhibited here was never carried out, but that you made another agreement. Was that made in Washington, or after you got to Havana?

Mr. DARLINGTON: I do not think that the witness said that the first agreement was not carried out.

70¾ Mr. PUTMAN: No, he said the amount of land was increased.

Q. The first agreement was changed by another agreement? A. There was an additional amount and the disposition of promoters' stock was changed.

Q. Was that second agreement—that changed agreement—in writing? A. My impresion is that it was, but I cannot state positively, as I have not got a copy of it.

Q. Do you know the contents of it?

Mr. DARLINGTON: One moment—if the witness does not know it was in writing, how can he know the contents of it? The question assumes that it was in writing, which he says he is not able to state positively.

Mr. PUTMAN: I will take his impression.

General REID: Shall I answer?

Mr. DARLINGTON: Yes, you may answer.

Q. I do not ask for the contents; I merely ask if he knew the contents of it. A. I give you my recollection of the agreement in general terms.

Q. Then there was such a written agreement? A. That I cannot say; there was an agreement.

Q. Did you ever have a copy of it? A. I am of the impression that I furnished to Runcie and Lamar a copy, but I cannot state positively.

Q. Have you ever made any effort to get it from Runcie and Lamar in anticipation of this examination? A. I have not.

Q. I believe you say that by that agreement you were to participate, yourself, in the forty per cent of promoters' stock to the extent of one-fourth of it. Is that true? A. Yes.

71 Q. Does the bill filed in this cause say anything about the provision that you were to have a portion of the promoters' stock?

Mr. DARLINGTON: I object to the question and instruct the witness he is not required to answer any questions as to what the bill contains.

A. If you will show me the bill I will tell you.

Mr. DARLINGTON: You need not do that, the bill speaks for itself.

Q. You say in the fourth paragraph of the bill that it was agreed

that the said defendants and their associates should be allowed forty per centum of the proposed capital stock. Was that a fact? A. The bill says that.

Q. Was that a fact? A. Yes.

Q. Was that the last agreement? A. The last agreement was that the forty per cent. was to be divided between us; Herbert and Micou to have one-fourth, Phillips to have one, Davis to have one and I to have one.

Q. With regard to the corporation with a capital stock of $25,000—do you refer to that? A. I refer to a corporation with a capital stock of $150,000.

Q. With regard to the purchase of the land for the sum of $25,000. A. No, I refer to the $34,000 purchase.

Q. Did the agreement for the purchase at the sum of $34,000—I believe you said—did that provide that Davis and Phillips and Herbert and Micou were to have all of the forty per cent. of
72 stock? A. Yes, at first.

Q. I see that the agreement that they have all the four shares and you should have none of it had reference to the corporation which should purchase for $25,000, did it not? A. Yes.

Q. You say in the bill that upon the representation of the defendants that $35,000 was the lowest price for which the vendor would sell, and having contracted to represent its said stoc-holders, or a corporation thereafter to be organized, namely, the complainant company, as their and its agent in the transaction, and agreed on a compensation of forty per cent. of its capital stock, it was a violation of the legal duty, and so on. Is that true?

Mr. DARLINGTON: Is what true? I shall have to ask the counsel what he means. I do not understand it, and the General very likely does not.

Q. Of capital stock. It was a violation of the legal duty of the defendants to conceal from its stockholders certain facts set out in the bill. I will ask you if it is true that in the corporation which was to pay $35,000 for the land these defendants were to receive forty per cent. of the stock—the promoters' stock.

Mr. DARLINGTON: I object to the question on the ground that the bill has not alleged that the defendants were to receive forty per cent. out of the stock.

General REID: Shall I answer?

Mr. DARLINGTON: If you have any answer to make.

General REID: I can answer to the best of my knowledge this question.

Mr. DARLINGTON: Please understand the question. He wants to know if Davis and Phillips were to get forty per cent. of the capital stock.

(Question read.)

A. They were to receive each one-fourth of sixty shares.

Q. And you were to receive the other fourth? A. That is the allegations of the bill.

73 Mr. DARLINGTON: I object to the question on the ground that the witness is not required to answer an argumentative question. I submit that the allegation in the bill speaks for itself and that it is not a matter calling for an answer from the witness on the ground that it does — call for any fact, but simply to an answer to an argumentative proposition of construction as to the minor allegations of the bill.

Q. Why didn't you state in the bill that you were to participate in the promoters' stock? A. I did not draw the bill.

Q. Why didn't you furnish the information that you were to do it?

Mr. DARLINGTON: I object on the ground that the question assumes as a fact that the General did not furnish the information.

Mr. PUTMAN: Do you instruct him not to answer?

Mr. DARLINGTON: No.

A. Why didn't I state that I was to—that is, you mean I was to participate?

Q. In the promoters' stock. A. I should just as leave furnish the information as not.

Q. But you did not?

Mr. DARLINGTON: Did not furnish it to whom?

Mr. PUTMAN: To the person who drew the bill.

Mr. DARLINGTON: He said he did not draw the bill.

Q. Did you furnish the information to the person who drew the bill? A. It is not in the bill.

Q. You read the bill over after it was drawn? A. I presume that I did.

Q. You swear in the affidavit that you did. A. I presume that I did; I signed it. You asked me why I did not furnish the

74 information. I had no reason for not furnishing it.

Q. The first agreement which you have exhibited here provides for the purchase of 4,000 acres of land, and the purchase price is named in it as $25,000 and the second agreement which you have testified to—a modification of that agreement, as you have testified—I believe you say was for an additional thousand, making the 5,000 acres, and the purchase price was raised to $34,000. The bill says $35,000. Which is correct? A. Both are correct.

Q. Will you explain that? A. On my return from Guantanamo to Washington Mr. Davis informed me that he had gotten an option on the lake; that is, 1000 acres additional, and the 5000 acres was increased for the purpose of including the lake in our possession, and the price was to be $1,000, and that made the additional $1,000.

Q. Yes. Do you know how many acres of land there are actually in that property, General, according to the survey? A. About 5,558.

Q. Who had that survey made? A. Davis and Phillips or Davis or Phillips, one or both, by a civil engineer.

Q. You have testified that Davis and Micou and you went to the Gray property and there found a man named Howard. Is that right? A. That is correct.

Q. Do you know whether Howard was an acquaintance of Davis' before that or not? A. I do not.

Q. Don't you know him yourself? A. I did not.

75 Q. Is it a fact that neither you nor Davis knew him before that, and is it not true that you struck up an acquaintance with him because he was from your home town, from Cleveland, Ohio? A. It is not.

Q. Is it not true that he was from Ohio. A. Yes, he was.

Q. Is it true that you asked him to go along? A. It is not; Davis asked me if I would like to have him go along, seeming to want him to go himself, and I said I would, and an engagement was then made for him to meet us.

Q. You knew when you want to Guantanamo that Micou was to act for you in securing an examination of the title to the property, didn't you? A. Yes, he was to act for the proposed stockholders.

Q. Well, the proposed stockholders were all in Cuba at that time, weren't they? A. No, Billings was away, and Mr. Herbert also.

Q. Well, Herbert and Micou took their interest as a partnership, didn't they? A. It was taken in the firm name.

Q. Billings never took any interest, did he? A. Billings had agreed to take six shares before we went to Cuba. On my return from Cuba, and when we were about to form the company, Micou informed me that Billings, whereas he would stick to his agreement and take the shares if necessary, would rather that we would dispose of them to somebody else.

Q. So he never took any interest? A. He took as much interest in it as any of us.

76 Q. Well, he never paid any money for it? A. At the time the property was deeded Billings was to have been the purchaser of six shares.

Q. Did you know whether he found out whether you were to get a portion of the forty per cent. of promoters' stock? A. I did not tell him.

Q. Where is he now? A. I have not the slightest idea. I never saw him afterwards.

Q. When you came back here from Cuba on that trip, how long were you here before Davis and Phillips came here? A. I returned, I think, about the first of April, or the early part of April, and Phillips came here sometime before Davis—I think Phillips was here in May—I don't know when he did come, but he was here attending the meeting of the proposed stockholders and getting out literature regarding the plantation some time before Davis came. I am not certain, but I think Davis came here in June.

Q. The company was not organized until Davis got here was it? A. The subscription was not gotten up until I think the eighteenth of June.

Q. Going back to Cuba for a moment—when you left Cuba, half of the purchase money for the Las Ovas tract has been paid, had it not? A. I paid my proportion; so far as I know, it was.

Q. One-half was still due to the people who owned the land. How was that secured? A. There were two mortgages, we would call

them, one for $2500 to Escalante and one for $15,000 to Madame Acosta, made the $17,500.

77 Q. General, were there ever any subscribers to the stock of this company except you and Davis and Phillips and Herbert and Micou who took any stock? A. Yes.

Q. Who? A. There were two—one by the name of Parker, and one named Ricks—one had six and one had four. They were stock owners.

Q. I asked you if there were any subscribers to this stock except the above parties I have named. A. Original subscribers to the stock?

Q. I do not mean purchasers of the stock, I mean subscribers. A. None except Billings.

Q. My question said, who took their stock. A. No.

Q. Then the persons I have named had subscribed to all of the stock before the company was organized? A. I do not think that is the case; I think that those six shares of Billings' still stood in his name, so that he was then one of the subscribers.

Q. Didn't Davis, when Billings defaulted or declined to carry it out, take up that stock for the joint account of you and Phillips and Herbert and Micou? A. No. He took it for himself.

Q. Didn't you agree at the same time in Havana that you made the agreement which you have exhibited here;—didn't you agree that if Billings should fail to take his stock Davis would take it for the joint account of the rest of you? A. That is not my recollection at all. I understood that if Billings did not take it the stockholders would take it in proportion to their shares of stock.

78 Q. When you went to Cuba and consulted Major Runcie and had these deeds translated to you about which you have testified, was that before or after the $17,500 became due—the deferred payments, I mean. A. It was immediately before.

Q. Did you contribute your share towards the payment of that $17,500 after Runcie had made the translation of those deeds to you? A. I furnished the money to pay the entire sum.

Q. All of it? A. Yes.

Q. You furnished the $17,500? You did that after Runcie had informed you as to the question of title?

Mr. DARLINGTON: One moment—I object to the question on the ground that there is no testimony that Major Runcie gave any information as to the state of the title.

Q. You paid the $17,500 after Major Runcie translated the deeds to you, and after you knew everything about the title that you now know, didn't you? A. Yes.

Q. Dr. Sowers testified the other day that Davis sold him the Billings shares. He says probably ten days or two weeks after this sale to him of the stock he told you that he had gone into the company with which you were connected. Is that a fact? A. I don't remember how long after it was—it was some time afterwards.

Q. He stated that he told you that Davis had kindly let him have

the six shares of stock that Billings had failed to take on the same terms that Billings had purchased? Is that correct? A. I think he did, to the best of my recollection.

Q. Did you tell him at that time that you had one-fourth
79 of forty per cent of that stock for nothing? A. Not to my recollection.

Q. You say that——

Mr. DARINGTON: Does counsel claim that General Reid's getting one-fourth of the promoters' stock affected Billings' interest in the corporation?

Mr. PUTMAN: I am not claiming that at all; I am just asking him a question.

Q. You say that Mr. Micou first spoke to you over the phone about Davis and Phillips' proposition. Had he never spoken to you in person about that before? A. No.

Q. When you got to his office, did he tell you that Davis and Phillips wanted to form a corporation? A. I do not remember, but my impression is that he did not say that they wanted to form a corporation.

Q. He did say that they had the land? A. He did say that they had a proposition regarding some land in Cuba—didn't say definitely what it was.

Q. What then did Davis and Phillips say as to how they put the proposition to you? A. My recollection is that they told me that they had this option on this land in Cuba and they proposed to form a company of so many shares of stock to pay the price named for the land and talked to me as one who might want to go into such a corporation.

Q. Did they have with them at this time this proposition for the formation of the company which you have exhibited in your deposition? A. That I cannot say, but my recollection is they did not. I knew nothing of the proposition until some little time after their first talk about it.

Q. Did they have with them this memorandum of agreement at that time? A. I don't know whether had it or not.

80 Q. Don't you know both of the papers which were drawn, which one you got first? A. I think I got them both about the same time. Phillips, according to my recollection, was engaged in drawing up propositions, but just which one of those were drawn up first I cannot say, or whether they were both together or not I cannot say.

Redirect examination by Mr. DARLINGTON:

Q. General, do you remember where you were when you signed and swore to the bill in this case? A. I do not.

Q. The bill purports to have been sworn to in Massachusetts. A. At Gloucester, Massachusetts.

Q. How near were you to your counsel when you signed it? A. About fourteen or fifteen hours' journey by rail. They were here in Washington.

Q. In reply to the inquiries as to who were the officers and directors of the company at the time the suit was authorized, you have not mentioned either Phillips or Micou. Were they either officers or stockholders at that time? A. They had sold their stock.

Q. And were they, or either of them, officers? A. No; Phillips had been manager, but he resigned from that position stating that, having sold all his stock, he resigned as general manager and as one of the directors.

Q. This was prior to the authorization of the suit? A. Yes.

Q. You have stated that Dr. Sowers was made vice-presi-
81 dent in place of Mr. Davis. Is Mr. Davis a director now?

A. No, I think not. I was not present at that meeting; I was in Cuba.

Q. You have stated on cross-examination that you gave Mr. Kane and Mr. Conrad Reid one share each. At whose instance was that done? A. Mr. Davis and Mr. Phillips both suggested it.

Q. You have been asked whether notice was sent to Davis of a special meeting of the board of directors. Where was Davis? A. In Havana.

Q. What had been the custom of the board of directors in regard to meeting without him when he was in Havana, and what objection, if any, had he ever made, in view of the fact that he was in Havana?

Mr. NORTON: Question objected to on the ground that the custom of the board of directors would not affect any of the rights of Mr. Davis as a director, unless he had in some way concurred in their action. The form of the question is objected to as it would not appear from the answer what Mr. Davis knew of the past customs of the board of directors or whether he was informed as to such matters afterwards, and then approved.

A. It was the custom of the board of directors to meet without him when he was in Cuba and I am not aware that he ever made any objections.

Q. What can you tell us as to his knowledge of the fact that the board met and transacted business in his absence, when he was in Havana? A. He knew that by communications we had sent to him regarding the action of the board of directors frequently.

Q. You, I believe, were the secretary of the board? A. Yes.

Q. Davis knew that? A. Oh, yes.

82 Q. You have said you had an impression that the agree-
ment increasing the amount to $34,000 was in writing. If so, where is the original of that writing, according to your best knowledge of the subject? A. If it is so, Major Runcie has my copy, or the only copy that the company had, that I know of.

Q. If there is an original not in the possession of Runcie, do you know where it is? A. No, I do not.

Q. Which came first, the proposition to increase the acreage of 5000, or the proposition to give you one-fourth of the promoters' stock?

Mr. PUTMAN: I object to the question on the ground that he has not testified that there was any proposition to give him one-fourth of the stock.

A. I think the proposition to increase the acreage to 5,000.

Q. Have you any doubt on that subject? A. No, I have no doubt.

Q. You have said in so far as you knew one-half of the purchase money had been paid in at the time you went to Guantanamo. One-half of what amount of purchase money? A. One-half of the $34,000.

Q. What knowledge had you at that time that one-half of the purchase money was only $10,000? A. I had no knowledge that it was only $10,000.

Q. You have said that at the time you paid the $17,500 above the amount of the mortgages you knew all that you now know, about the title to the property. Did you then know that the real price was only $20,000? A. I knew when I paid the money in that the deed from Madam Acosta to Escalante stipulated the price to be $20,000 by hearing the Major reading it.

Q. You have testified that at that time Davis gave an explanation of that. Did you know as a matter of fact that the
83 price was not really $34,000. A. No, I did not.

Q. When did you learn that Mr. Davis' explanation was incorrect? A. Well, I learned it absolutely when I was in Havana this present month.

Q. How long before the filing of this bill did you have sufficient knowledge to give you the belief that the real price was $20,000? A. I had sufficient knowledge to give me the belief that the price was $20,000 when I gave Major Runcie the money to pay the last instalment.

Q. You mean that at that time you doubted the truth of Davis' explanation? A. I did.

Q. Why did you pay this large amount?

Question objected to by Mr. Putman.

A. I paid it on the advice of counsel. It was so near to the expiration of the time when the second payment was to be made, and as Ricks and Parker had both failed to pay their assessment at the time of making this payment on the land, I was afraid that if the land was not paid for the vendors could have some action by which they could take back their land.

Q. And you would lose what you had paid? A. I feared I would.

Q. You paid the whole of the $17,500? A. The company authorized me to negotiate a loan to meet that payment, and I loaned the company $18,000 and took their note for it.

Q. What became of the other $500? A. It is now in the hands of Major Runcie.

84 Recross-examination by Mr. PUTMAN:

Q. You say that it was the general custom to hold meetings of the board of directors in Washington without Davis' presence. Isn't it a fact that you notified him of every called meeting that the directors had except the one that authorized this suit against him? A. No, I do not think that is so. The records will show.

Q. You don't know whether this is true or not? A. I think it is not—I am quite sure it is not.

Q. Didn't you notify Davis of the meeting immediately preceding the one that authorized the suit against him. A. I cannot say from memory.

Q. Didn't you notify him of the only one meeting that has been held since that time—since the authorization of this suit? A. No, I think not; I think there have been two or three meetings that he has not been notified of.

Q. You notified him of the meeting that was held in Alexandria deposing him, did you?

Mr. DARLINGTON: I object to the question on the ground that that was a stockholders' meeting.

General REID: Shall I answer?

Mr. DARLINGTON: Yes.

A. That was a stockholders' meeting.

Counsel for complainant announces that his testimony is now closed except certain depositions which he desires to take in Havana. It is thereupon agreed that these depositions may be taken before Joseph A. Springer, the American Vice-Consul at Havana, at
85 such time as shall hereafter be agreed upon between counsel, the depositions to be taken orally, unless counsel shall hereafter prefer to take them by written interrogatories.

I have made a careful search for the letters referred to on pages 24 & 25 & have been unable to find them among my papers. I believe these letters were sent to Major Runcie in Havana.

GEO. C. REID.

Sworn to before me as aforesaid, and subscribed as corrected, this 6th day of April, A. D., 1906.

T. H. FITNAM, *Examiner.*

86 (The witness Gen. George C. Reid, before signing, this 6th day of April, A. D. 1906, adds the following to his third answer on page 30:

"I wish to add to my answer to the second question on page 65: 'I have, however, an indistinct recollection of hearing Davis say, the morning of the day he sold Sowers the stock, that Sowers was going to buy the six shares of stock that Billings was to have taken.'"

T. H. FITNAM, *Examiner.*

87 COMPLAINANT'S EXHIBIT A.

WASHINGTON, D. C., *May* 13, 1904. No. —.

American Security and Trust Co.

Pay to Norman H. Davis or order $1333.33 Thirteen hundred & thirty three—33/100 Dollars.

Z. T. SOWERS.

(Perforation)
Paid

Endorsed: Benj. Micou, Norman H. Davis.
[Across face in red ink:] Paid May 13 1904. American Security & Trust Co.

88 COMPLAINANT'S EXHIBIT No. 1.

Proposition for the Formation of a Company for the Purchase and Development of a 4,000 *Acre Tract of Land in Cuba, Known as "Las Ovas," and Situated Near the Station of "Las Ovas," on the Western Railway of Havana, Province of Pinar del Rio, About* 80 *miles West of Havana.*

It is proposed to form a stock company with a capital of $150,000.00 which will purchase and develop the said 4,000 acre tract of land. The property will cost $25,000, 50% in cash and 50% in twelve months. In addition to this it is estimated that about $5,000 will be necessary for the expenses of exploitation, 50% of this to be paid in to the Treasury on the formation of the Company and 50% later on, if found necessary. Thus only $15000 will be necessary for the consummation of the deal for, as it will be shown subsequently, the receipts of the Company will be more than sufficient to meet the second and last payment of $12,500 on the land.

The promoters are to receive 40% of the stock on the proposed Company as their share for promoting and carrying out the enterprise. The remaining $90,000 worth of stock will be given to the people who subscribe the $15,000 now necessary and who obligate themselves to pay the remaining $15000 if found necessary.

89 *Plan for Developing and Exploiting the Property.*

There is at the present time a great desire on the part of many people in the United States to own property in Cuba, especially that suitable for producing citrus fruits and this land has been selected on account of its special adaptability for this class of products. There is in fact quite a demand from the middle class of people for small tracts of land in Cuba for this purpose; but this has been very difficult because most of the land is held in large tracts by Spaniards who will not subdivide it. Another difficulty has been

that the man of small means is not able to move to Cuba and wait for the time necessary for an orange grove to become a paying investment. However, notwithstanding this, 1/5 of the land in Cuba has been purchased by Americans during the last four years, and each boat carries prospective purchasers.

Our object in therefore to overcome these two difficulties in the following manner:

The 4,000 acre tract will be subdivided into 400 ten acre tracts, which will be sold for $500 each, the Company at the time making a contract with each purchaser to plant his tract in oranges, lemons, or grape fruit, before the end of one year, and to care for it for the term of fifty months from the date of purchase, provided he pays the sum of $30 per month for 50 months, and $250 at the end of 60 months, making a ten acre grove cost at the end of 5 years the sum of $2250; after which time it will easily produce from $2500 to $5000 per annum.

90 *Profits to the Company.*

First, from the sale of 400 ten acre tracts at $500 each, the Company will receive	$200,000
Deducting the cost and expense of same	30,000
There will result from the sale of land a net profit of	$170,000
Second, from the planting and caring of 400 ten acre tracts, the Company will receive during the period of sixty months the sum of	$700,000
Then deducting from this the cost of same, which it is estimated cannot exceed $1250 for each ten acre tract or for the 400 lots, the total sum of	500,000
There will result from the planting a net profit of	$200,000

It is estimated that all of the 400 ten acre tracts can be sold within twelve months, thus giving the $170,000 profit to the Company within that time.

The net receipts from the planting will be kept in the Treasury for the five years, thus giving at the end of that period another profit of $200,000, making a total profit from both sources of	$370,000

91 COMPLAINANT'S EXHIBIT No. 2.

Duplicate.

This memorandum of agreement by and between the parties signing the same, witnesseth:

Whereas, Charles T. Phillips and *Norman H. Davis* of Havana, Cuba, and *Hilary A. Herbert* and *Benjamin Micou* of Washington, D. C. under the firm name of Herbert & Micou, have secured an

option on a tract of land in Cuba containing 4,000 acres, more or less, the said land being the southern portion of the estate known as "Los Ovas," which estate contains 7,000 or 8,000 acres and is known as the property of the Widow Tarafa; the said 4,000 acre tract, the subject of this agreement, being situate in the Province of Pinar del Rio, south of the Western Railroad of Havana and extending to Lake Negrito;

Whereas, if this 4,000 acre tract of land is suitable for the profitable raising of citrus fruits, oranges, lemons, grape fruit and the like, and a clear title can be obtained to the same, it is the desire of all the parties to this agreement that a corporation be formed under the laws of one of the States of the Union, to have its main offices at Washington, District of Columbia, for the purpose of acquiring this 4,000 acre tract of land and disposing of the same in ten acre or other suitable sized lots for groves of oranges, lemons, grape fruit, or the like; it is agreed as follows:

That Messrs. Phillips and Davis and Messrs. Herbert & Micou will acquire this tract of land for a company to be organized for the purpose above mentioned, for the sum of twenty-five thousand ($25,000) dollars, $12,500 in cash on delivery of the deed of transfer,
92 and $12,500 payable in twelve months, and 40% of the stock of the company which is to be formed for the purpose of acquiring, developing and disposing of this property, said company to be organized upon general lines as follows:

To have a capital stock of one hundred and fifty thousand (150,000) dollars, 40% of which, or $60,000 worth of stock to be given to Messrs. Phillips and Davis and Herbert & Micou as compensation for securing the land and the preliminary work of getting up and incorporating the company afterwards to be organized; the remainder of the $150,000 *dollars* of stock viz., 90,000 dollars, to be disposed of to the subscribers thereto for one-third of its face value, or $30,000; $25,000 of this money to go to the purchase of the land and $5,000 to be used as an expense fund as directed by the company for the purpose of effecting sales of the lots into which the 4,000 acres shall be divided; this $90,000 worth of stock to be taken by the subscribers at one-third of its face value upon the following terms:

One-half (1/2) payable down and the other half payable if necessary at the end of twelve months from the date of subscription.

It is further agreed That in case it is desired by the persons subscribing to $60,000 of the $90,000 dollars of stock, the remaining $30,000 will be taken by Messrs. Phillips and Davis and Herbert & Micou, to be divided between them as follows: $10,000 to Charles T. Phillips, $10,000 to Norman H. Davis, and $10,000 to Herbert & Micou; but as these last named parties would own between them the $60,000 dollars of the stock to be given for the purpose
93 of promoting the Company, and this $30,000 additional would give to them a controlling interest in the stock, they are only to take said $30,000 of the stock if it is desired that they do so by the other stockholders; or they are willing to take such por-

tion thereof as the other stockholders may be willing that they should have.

We the undersigned hereby bind ourselves, our heirs and assigns to take the number of shares of stock subscribed to by us, to be paid for at one-third (1/3) of its face value, one-half (½) down and one-half (½) at the end of the year, if the second payment is necessary, upon the following conditions:

That the hereinafter named subscribers will select a person to go to Cuba without delay to examine the land and to investigate the title to the same, and in case a good title can be secured and the land is found to be suitable for the profitable culture of citrus fruits—oranges, lemons, grape fruit and the like—then this agreement to be in full force and effect, but otherwise to be null and void; and in case a good title cannot be secured, or the land is found to be unsuitable for the purpose for which it is intended under the tenor of this agreement, then the persons who were to receive the $60,000 shares of the promoters' stock shall bear the necessary expenses of the trip to Cuba of the person selected by the subscribers hereto to make the investigation thereof.

		Number of shares subscribed nominal value $1000 each.
	Chas. T. Phillips.....	60 shares.
	Norman H. Davis.....	
	As Promoter shares	
94	Chas. T. Phillips.....	10 shares.
	Norman H. Davis.....	10 shares.
	Geo. C. Reid.....	30 shares.

95 *Depositions on Behalf of Complainant and Defendants.*

Filed July 2, 1906.

No. 25,622, Equity Docket.

THE "LAS OVAS COMPANY," INCORPORATED, a Body Corporate,
versus
NORMAN H. DAVIS ET AL.

The execution of this commission appears in certain schedules hereunto annexed.

Habana, May 14th, 1906.

JOSEPH A. SPRINGER,
Commissioner.

* * * * * * *

Depositions of witnesses, produced, sworn and examined on the twenty-fifth day of April, 1906, and the days subsequent, as hereinafter stated, at the City of Habana, Republic of Cuba; in a certain cause depending between Las Ovas Company, Incorporated a Body Corporate, *vs.* Norman H. Davis, *et al;* Equity Docket 57; No. 25,622; under and by virtue of a stipulation between counsel; as follows:

96 CIRO TARAFA, 35 years of age, a witness of the complainant, being first duly sworn, declares as follows:

My name is Ciro Tarafa, 35 years of age, and am a property owner, and reside in the city of Havana.

Q. What is the name of your mother? A. Ana Acosta Vda. de Tarafa.

Q. Was your mother the owner of the property known as the "Sobrantes de las Ovas" in Pinar del Rio? A. Yes.

Q. Did she sell that property, and if so, when and to whom? A. She sold the said property to Gustavo E. Escalante on March 25th, 1904.

Q. Did that sale include the whole of the property? A. No.

Q. Did you negotiate that sale as the representative of your mother? A. Yes, but I did not sign the deed.

Q. With whom did you negotiate for the sale of the property? A. With Messrs. Davis and Phillips.

Q. At what time did these negotiations begin? A. More or less I can state that they commenced about two months before they were completed.

Q. State briefly the course of the negotiation and the various propositions which were made by you, and by Mr. Davis and Mr. Phillips. A. In the beginning, or rather as the result of the negotiations, I gave to Messrs. Davis and Phillips, or rather my mother gave the option, as I acted as her intermediary, in which option were stated four prices. First: the total amount of the purchase of the property for $25,000.00 American money; a

97 portion of the property, but without stating any measurements, and by adding thereto a strip of land, the price was for $19,000.00; and finally, for $22,000.00 within the limit stated up to March 24th, but it happened that on this date the price was reduced by $2,000.00.

By Mr. PUTMAN:

Q. Was that option you have described as given by your mother to Messrs. Davis and Phillips, in writing? A. It was.

Mr. PUTMAN objects to witness testifying as to the contents of the option.

By Mr. DARLINGTON: We have called on the other side to produce this option if in writing, and will be pleased to have it produced.

Examination continued:

Q. What was the first offer that was made to Messrs. Davis and

Phillips for the sale of the property? A. I do not remember the first proposition, there were so many.

Q. Was the first proposition made for the sale of the whole or part of the property? A. Of all the property.

Q. At what price did you offer the whole of the property? A. From $25,000.00 to $30,000.00, but would accept $25,000.00.

Q. Was this offer accepted or rejected immediately? A. It was immediately rejected.

Q. Who rejected it, Mr. Davis, or Mr. Phillips? A. Both of them I believe.

Q. What was the next proposition made? A. I do not remember. I think it was that I should sell a part of the property; there were a number of propositions made almost daily.

98 Q. What price was offered you for a part of the "finca," after your offer for the whole property had been rejected? A. I was offered from $10,000.00 to $15,000.00 but I am not sure.

Q. Did you accept or reject that offer? A. I accepted it.

Q. What modification was then proposed, and by whom? A. I have already said that almost daily there were different propositions, which I could not retain in my memory, but I remember only the last one.

Q. Was it proposed to purchase a greater or smaller part of the finca—that is—to add to the portion to be sold after the $16,000.00 price had been accepted? A. Yes, I consented to increase the same by adding another portion.

Q. What was the increase in price for the added portion? A. $3,000.00 more, to make up $19,000.00.

Q. Was that proposition accepted by both parties? A. Yes.

Q. What subsequent modification of the agreement was proposed? A. By adding more land to make up a total price of $22,000.00.

Q. Was that modification accepted by both parties? A. Yes.

Q. Did the last addition to the land to be sold, include the lake which is on the property? A. It did.

Q. How long before the deed of sale was executed, did you reach this agreement, that the lake should be included in the

99 sale? A. Less than a week.

Q. What subsequent modification was made in the price which was to be paid? A. $2,000.00.

Q. For what reason was the reduction made? A. Because there was found in the Register of Property that the property was burdened with several "capellanias" (incumbrances) which affected the whole of "Las Ovas" Grant, of which the part sold was a portion.

Q. Was it not some days before the final reduction of the price to $20,000.00 that you agreed to include the lake in the tract to be sold? A. On the 16th of March, 1904, the land was increased to include the lake for the sum of $22,000.00.

Q. How do you fix that date? A. Because I have a copy of the option which I gave to Messrs. Davis and Phillips.

Q. Is that the copy which you have? A. It is a Draft.

Q. Who wrote that copy? A. Myself, it is a draft.

Q. Was the option signed as you have it there in draft? A. Yes.
Q. To whom did you deliver the copy which was signed? A. To Messrs. Davis and Phillips.

By Mr. DARLINGTON:

Q. I ask the counsel for the defendant if he can produce the option in accordance with the request made of him.

By Mr. PUTMAN:

A. No, we have not got the option.

It was thereupon, between counsel, stipulated, that the draft of the option referred to by the witness shall be filed with his deposition as exhibit A. Tarafa, accompanied by a translation made by the commissioner Joseph A. Springer, subject to any just legal exceptions which may be noted before the close of the depositions in Havana.

Q. By Mr. Runcie, on the exhibit, and to the line marked "red border." What portion of the *finca* or property with respect to this line was offered for $16,500.00 American Money. A. All above the red line, I had offered for $16,500.00 American Money.
Q. For what price did you subsequently offer all the land above the line (blue.) A. For $19,000.00 American Money.
Q. Who proposed to include all the land above the line marked ED? A. Mr. Davis.
Q. What price did you ask for the property including the addition so proposed by Mr. Davis? A. $22,000.00 American money.
Q. Does the addition proposed by Mr. Davis include the lake? A. Yes.
Q. Who drew the line E.D. on this sketch? A. On this draft exhibit, I drew it, but on the original Mr. Davis drew it.
Q. And this agreement was reached and signed on March 16, 1904? A. My mother signed the agreement on the 16th of March for the sale of the land for that sum. All above the line E D.
Q. And that agreement was not modified in any respect until March 24th, 1904? A. It was modified by the sum of $2,000.00.

Q. How long before the deed of sale was signed, was the reduction of $2,000.00 agreed to? A. One day before.

Q. Were you present when the deed of sale of the property was signed by your mother on March 25th. 1904? A. I was.
Q. Did you sign that deed? A. I did.
Q. For what purpose?

Mr. Putman objects because the deed is the best evidence.

A. Because I was the owner of a mortgage credit on the property, and was present at the execution of the deed to cancel the same.
Q. What other persons were present at that time? A. There were present, my mother Ana Acosta Vda. de Tarafa her five children, Messrs. Davis and Phillips Mr. Romaguera, Mr. Micou and Mr. Gustavo Escalante the purchaser of the property.
Q. Had you ever seen Mr. Escalante before that time. A. No.

Q. When did you learn that Mr. Escalante was to be the purchaser of the property? A. The same day of signing the deed.

Q. Did you know that before you arrived at the Notary's office. A. No.

Q. Who told you that Mr. Escalante was to purchase the property? A. Mr. Phillips.

Q. Did Mr. Phillips explain to you why Mr. Escalante was to purchase the property and not the holdings of the option? A. I do not remember.

Q. Did you advise your mother to execute the sale of the property to Mr. Escalante while other persons had an option to
102 purchase it. A. I advised my mother to sign the deed.

Q. Do you mean that you advised your mother to sign the deed in favor of Mr. Escalante? A. Yes.

Q. Did you have any discussion with your mother as to the propriety of signing the deed? A. No.

Q. Did your mother express to you any fear of what may result from signing that deed? A. Yes.

Q. What did your mother say? A. That she did not know Mr. Escalante, and that I might afterwards have trouble with Mr. Davis because I sold it to another, and not to him.

Q. Did you at any time after that secure a cancellation of the option which had been given to Mr. Davis and Mr. Phillips? A. We agreed upon the signing of the deed, that the option should be destroyed, but this was not done because it was forgotten.

Q. Did you at any time after that in any writing secure a cancellation of all previous options? A. Yes, about two months afterwards it was agreed in another option, given to Mr. Davis and Mr. Phillips to cancel all previous options.

Q. Did that later option given to Mr. Davis and Mr. Phillips apply to any of the land of the Hacienda "Sobrantes de las Ovas"? A. I gave an option on the part of the property that had not been sold to Mr. Escalante.

Q. How much money was paid to your mother at the time when the deed of sale to Escalante was executed? A. $5,000.00.
103 Q. Was that payment made in cash. A. Yes.

Q. Who delivered the money to your mother? Mr. Escalante.

Q. Did Mr. Micou have any part whatever in that sale so far as your mother was concerned? A. None at all.

Q. Did you see any money or any checks on that occasion other than the $5,000.00 cash which was delivered to your mother? A. I saw only the $5,000.00.

Q. From whom did you or your mother receive payments of the interest on the mortgage of $15,000.00. A. Mr. Davis gave me drafts for the interest.

Q. Did you have any difficulty in collecting the installments of the interest? A. No.

Q. Was your mother in a condition of poverty or in straitened circumstances at the time that this sale was made? A. No.

Q. It is stated in the complaint that the defendant Davis and the

defendant Phillips represented that the said land had been bought from the widow Tarafa for $35,000.00, that the said sale was a great sacrifice upon the part of the said Mrs. Tarafa, who was compelled to sell and that the said land was worth not less than $20.00 per acre. Is it true that your mother was for any reason compelled to sell the land? A. No.

Q. Was a price of $35,000.00 for the land ever offered to or considered by your mother or you? A. Never.

104 Q. What do you consider to be the present value of the land sold by your mother to Escalante? A. I am not a land expert, but I believe the land is worth from $23,000.00 to $25,000.00.

Mr. Putman objects because it does not appear that the witness knows the value of this real estate.

Cross-examination by Mr. PUTMAN:

Q. When was the first option between you and Davis and Phillips signed? A. In January 1904.

Q. What land did that option include?

By Mr. DARLINGTON: We object and call for the production of the option as the only competent evidence.

A. I cannot state exactly.

Q. Is there a railroad running across this property? A. Yes.

Q. Did not that option include all of the property south of the railroad down to the red lines on the sketch you have shown? A. I cannot state exactly the lands comprised in the option because I do not remember.

Q. That option provided for the payment of $10,000, did it not? A. Yes, American Money.

Q. Was that option signed by Messrs. Davis and Phillips? A. It was signed by my mother to Messrs. Davis and Phillips.

Q. What has become of that paper? A. The option in the form of a letter was delivered by me to Mr. Davis.

Q. You have stated that subsequently land from the red line down to the blue line was added and then the price pro-

105 vided to be paid was $19,000.00?

Mr. Darlington objects, because the question unintentionally no doubt mis-quotes testimony. The witness has not stated that the land between the red and blue line was added to the January option or had any connection with it, on the contrary, the land between the red and blue lines according to testimony was added to all the land lying above the red line including the land lying off the railroad.

Mr. PUTMAN: I believe I have mis-understood the witness, and will withdraw the question.

Q. Did the option of January 1904 for $10,000.00 include any land lying north of the railroad? A. I do not remember.

Q. When was the option for $16,000.00 given? A. March 16th 1904.

Q. Was that option signed by Davis or Phillips? A. No, signed by my mother.

Q. What land was included in the option for $19,000.00? A. All the land above the line marked "Blue line" in the sketch.

Q. How much land is there North of the blue line? A. I do not know.

Q. How much is there between the blue line and the red line? A. I do not know.

Q. The next option, I believe you say, was for $22,000.0- did that include all the land finally deeded to Escalante? A. Yes.

Q. And that option was made necessary by the addition of the lake and some other land about it. A. Yes.

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Q. Who proposed the addition of the lake? A. Mr. Davis.

Q. Do you know General Reid, the gentleman sitting there? A. I have been introduced to him by Mr. Davis.

Q. Did you go with General Reid, Mr. Davis and some others to examine the property before the deed was made to Escalante? A. No.

Q. If any witness has testified that you did go with that party, are they mistaken? A. I want to rectify. I do not know if I went with them or whether I went to meet them upon their return, to Calabazar. I have been at other times on such trips, but I cannot state if I went with General Reid, Mr. Davis and others.

Q. Now that you have thought of it more, don't you remember at the time that Mr. Davis and General Reid came to "Las Ovas," Mr. Davis acted as interpreter between you and General Reid, and Mr. Micou, and you there got acquainted with General Reid and Mr. Micou. A. No, I was presented to General Reid at the Colonial Bank, introduced by Mr. Davis.

Q. Where did Davis first propose to include the lake in the purchase? A. I do not remember.

Q. Was it before or after the visit of General Reid and Mr. Davis to "Las Ovas"? A. It was on the 16th of March.

Q. After the visit to "Las Ovas," and before the purchase was consummated, didn't you, Davis, Phillips, Micou, and General Reid, have several consultations about the purchase in Davis's office in Havana. A. Yes, I went there to treat with them on the matter, in representation of my mother, I went often.

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Q. Wasn't it at these consultations, or one of them, that the proposition was made to include the lake? A. The proposition to include the lake was made on one of these visits, on the 16th of March.

Q. Why was the price finally reduced from $22,000.00 to $20,000.00? A. Because there appeared to be some incumbrances, ("capellanias") on the property.

Q. And the $2,000.00 was deducted from the purchase price because of these incumbrances. A. Yes.

Q. Do you speak English at all, or understand it? A. No.

And further the witness saith not.

CIRO TARAFA.

108 (*Translation.*)

HABANA, *March 16th*, 1906.

Messrs. Charles F. Phillips and Norman Davis, Present.

DEAR SIRS: With the intervention of Sr. O. Romaguera, I will sell you my farm "Sobrantes de Hacienda Ovas", Pinar del Rio, for the sum of $25,000, U. S., absolutely free of expenses to me, but you, however, to acknowledge the *censo* of $2,233, Spanish gold, now an encumbrance upon a portion of said property, whereof a sketch appears on the back of this letter.

Or, I will sell you a portion of said property that marked on the sketch with a red line, at a price of $16,000, U. S., free of all charges to me.

But if you wish to acquire more land, that is, the portion comprised between the red line up to the line marked blue line on the sketch, then I should claim for this increase of land $19,000, U. S., also free of all charges to me, and you to acknowledge the *censos* on Cayos Roble and Junco, which amount to $2,233, Spanish gold.

Not being positive regarding the number of hectares which I own in said property "Sobrantes de Hacienda Ovas", notwithstanding that the deed states that it measures 1566 hectares, I give you notice that, if from the survey which you will have made by an expert at your own expense, there should result a greater number of hectares than what is noted in the deed, they shall remain to your benefit; but if there should be less, the price of sale stipulated in this letter shall not for this reason be altered.

109 Upon making this sale, I reserve two caballerias on the border marked in the sketch with a green line, and a new tobacco house on Roble; further, the contracts made with tenants shall be respected, and to effect and carry out this purchase, I give you an option of 60 days counting from this date.

(*Sketch.*)

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HABANA, *March 16th*, 1906.

Messrs. Charles Phillips and Norman Davis, Present.

DEAR SIRS: With the intervention of Sr. Oscar Romaguera, I will sell you my property known as "Sobrantes de Hacienda Ovas" for the sum of $25,000, U. S., free of all charges to me, and you to acknowledge the *censo* of $2,233, Spanish gold a sketch of which property appears on back of this letter.

Or, I will sell you a portion of said property, that marked on said sketch with a red line, for a price of $22,000, U. S. free of all expense to me, you to acknowledge the *censos* on Cayos Roble and Junco, which amount to $2,233, Spanish gold.

Upon effecting this sale, I to reserve two caballerias on the border marked in the sketch with a green line.

All the contracts entered into with the tenants shall be respected.

And to carry out this purchase, I give you an option of 60 days counting from date hereof.

A faithful translation from the original Spanish,

JOSEPH A. SPRINGER,
Commissioner.

110 REPUBLIC OF CUBA,
City of Habana:

I, the undersigned, Joseph A. Springer, Commissioner, do certify, that Ciro Tarafa, the witness, personally appeared before me on the twenty-fifth day of April, 1906, at the office of the U. S. Consulate General at Habana, at ten thirty o'clock before noon, and after being first duly sworn to testify the truth, the whole truth and nothing but the truth, did depose to the matters contained in the foregoing deposition, and did in my presence subscribe the same, and endorsed the exhibits annexed thereto.

I further certify, that the interrogatories were propounded to the witness by me in the Spanish language; his answers given in the Spanish language were translated by me into English and reduced to writing, and before subscribing his deposition the same were read over to him in the Spanish language.

And I further certify, that I have subscribed my name to each half-sheet thereof, and to each exhibit.

And I further certify that James E. Runcie and J. J. Darlington appeared in behalf of the Complainant, and that Samuel A. Putman appeared in behalf of the Defendant.

JOSEPH A. SPRINGER,
Commissioner.

111 GEORGE C. REID, retired, Marine Corps, being first duly sworn, declares and states as follows:

My name is Geo. C. Reid, Brigadier General, Marine Corps, retired.

Q. General, you have already testified in Washington as a witness in this case. A. I have.

Q. I find I omitted to ask you how much money you have thus far paid in connection with this "Las Ovas" enterprise. I will now ask you to state the amount. A. Between $24,000.00 and $25,000.00.

Q. Does that include or exclude interest? A. It excludes.

Cross examination by Mr. PUTMAN:

Q. Does that sum which you have stated represent your net payments individually, or does that include money paid by you and afterwards refunded by other parties? A. That includes all moneys that I have paid, and I am not aware that there has been any refunded of that money.

Q. You testified on your other examination that when the second payment on the land became due you advanced the Company $18,000.00, do you include that $18,000.—in the expenditure of

which you have now testified? A. No, except, I think, some six hundred and some odd dollars which has never been repaid to me.

Q. Who repaid to you all of that $18,000.00 except the six hundred? A. I repaid to myself something over nine thousand dollars, Mr. Norman H. Davis repaid to me his portion of the last payment on the land amounting I think, to $4,600.00 and some odd dollars. Dr. Sowers repaid to me his portion of the last payment on the land amounting to about $1,200.00, and if I
112 remember correctly he paid me his portion of the last quarter's interest due on the mortgages that were on the property. I will say that all amounts that were paid me are endorsed upon the $18,000.00 note which is in the hands of the Washington Loan and Trust Company.

Q. Who put it in the hands of the Washington Loan and Trust Company? A. I did.

Q. Can you give the items that go to make up the expenditure of about $24,000.00 to which you have just testified? A. It is contained in a book which I here produce and which my counsel will produce at any hearing in the case if notified to do so. I would say that the items in this book referred to, do not include what I paid Mr. Phillips and Mr. Micou for the stock which I bought from them; Mr. Phillips I paid $1,800.00 and to Mr. Micou $1,591.00.

Q. When did you buy the stock of Mr. Phillips and Micou? A. It was in December 1904, or January 1905.

Q. Does this payment to which you have testified include assessments on stock purchased from Phillips and Micou? A. Yes, I think it includes one assessment. It may include two. It includes all assessments since I purchased the stock.

Q. General, what is the book which you presented yesterday and said contained the amount of your expenditures in the "Las Ovas" matter? A. It is a ledger account, the Company's accounts.

Q. On what page does your account appear? A. It is all on page one.

Q. The items contained on page one, then, comprise the
113 entire cost to you of your interest in the Company? A. Yes, except what I paid for the stock of Mr. Micou.

Q. You have testified that after your first visit to the "Las Ovas" property you went to Guantanamo. A. I think so, I know I did go.

Q. Do you remember the day you went? A. I think it was on the 22nd. or 23rd. of March 1904.

Q. What day did you return? A. I think on the 27th. or 28th.

Q. Do you know Mr. Claudio Mendoza? A. I do, I have met him in Havana.

Q. Had you met him before you went to Guantanamo?

By Mr. DARLINGTON: I object, on the ground that this is not cross examination being wholly irresponsible to the direct examination of the witness either here or in Washington.

A. No.

Q. When did you meet him? A. I met him first on the best of my recollection when I came down here either in January or the following March of 1905.

Q. When did you first hear that there were censos upon the "Las Ovas" property? A. When I came back from Guantanamo in March 1904, Mr. Davis told me that there were censos on the property.

Q. When did you first hear that Escalante was a party to the deed to Micou? A. At the same time that I heard from Mr. Davis that there was a censo on the property.

Q. You have testified that a man named Howard went with the party to the "Las Ovas" property. Who paid Howard? A. I don't know, unless it was Mr. Davis who paid the expenses of the
114 party at Pinar del Rio, and we afterwards reimbursed him.

Q. Do you remember when Davis went to Washington in May 1905, don't you. A. I remember Mr. Davis being in Washington sometime in May .

Q. Do you remember how long he stayed there? A. I do not.

Q. Do you think he stayed there as much as a week or ten days? A. I remember he was there, but I cannot say how long.

Q. During that visit, didn't you and Davis and Dr. Sowers and Herbert and Micou meet at Herbert and Micou's office and sign the petition for the charter of the "Las Ovas" property? A. I think we did but I don't remember signing the petition.

Q. You knew at that time that Dr. Sowers had bought the Billing stock? A. Yes.

Redirect:

Q. You say you first heard of Escalante as a party to the deed to Micou at the same time Mr. Davis told you of the small censo, what did Davis say at that time? A. I would like to modify my answer to that question. I did not know at that time that the property had been deeded to Escalante by Micou, but I heard of Escalante's connection with the matter of the transaction.

Q. State as well as you can recall it all that Mr. Davis told you about Escalante at that time. A. Mr. Davis told me that madame Acosta had conveyed to her daughters some interest in the "Las Ovas" property which we were to purchase, and that accord-
115 ing to the Laws of Cuba, this interest could not be reconveyed by these children to their mother, and that it was necessary to have that interest conveyed to a third or an outside person, and that was the way Escalante became interested in the transaction.

Q. I will ask you one further question. Can you tell us more exactly than you have done, how much money you have paid in this exterprise, including the money that you have paid to Phillips and Micou? A. $24,419.45.

Q. At the time you bought Phillips and the Micou stock what knowledge, if any, had you, that $35,000.00 had not been paid for the property, but only $20,000.00. A. None.

And further witness saith not.

GEO. C. REID.

116 REPUBLIC OF CUBA, *City of Habana:*

I, the undersigned, Joseph A. Springer. Commissioner, do certify, that George C. Reid, the witness, personally appeared before me on the twenty-fifth day of April, 1906, at the office of the U. S. Consulate General at Habana, at three o'clock p. m., and after being first duly sworn to testify the truth, the whole truth and nothing but the truth, did depose to the matters contained in the foregoing deposition, and did in my presence, subscribe the same.

And I further certify that I have subscribed my name to each half sheet thereof.

And I further certify, that James E. Runcie and J. J. Darlington appeared in behalf of the Complainant, and that Samuel A. Putman appeared in behalf of the Defendant.

JOSEPH A. SPRINGER,
Commissioner.

117 JAMES E. RUNCIE, 47 years of age, a lawyer by profession, residing in this city, being duly sworn and examined on the part of the complainant, deposes and states as follows:

Q. Mr. Runcie, are you a lawyer residing in Havana? A. Yes sir.

Q. Are you the Major Runcie referred to in the testimony as having attended the matter of paying off and discharging the $17,500.00 mortgage upon the Las Ovas company's lands in March 1905? A. Yes sir.

Q. Will you please state the facts and circumstances attending that transaction. A. On March 25th. 1905 at the office of Francisco J. Daniel a Notary public in Havana, I paid to Sra. Ana Acosta, Widow of Tarafa $14,500.00 in cash on account of the principal of a mortgage for $15,000.00 and I also paid her $375.00 in cash for interest then due on that mortgage. I paid to Gustavo Escalante $2,500.00 in cash for the principal of a mortgage held by him, and I also paid to him, $62.50 in cash for interest due on that mortgage. A deed was executed before the notary by which Senora Acosta acknowledged the receipt of the principal and interest of her mortgage and she cancelled and released it. Escalante, by the same deed, cancelled and released the mortgage held by him; they both signed the deed which I also signed as the Agent of the Las Ovas Company. I subsequently paid the taxes levied by the Government on the cancellation of mortgages and presented the deed for record in the Registry of Property at
118 Pinar del Rio where it was duly recorded and the mortgages were cancelled of record.

The amount paid to Senora Acosta was $500.00 less than the principal called for by the mortgage, because at the time when she sold the property to Mr. Escalante she undertook to acquire for him the ownership of a small tract called "Cayo Macagua" included within the tract which he sold, but not owned by her, and it was stipulated in that deed that if she failed to acquire the tract mentioned, there should be deducted from the unpaid balance of the purchase price

at the time of the final payment, the sum of $500.00. Mr. Escalante conveyed the land purchased from Senora Acosta, subject to this condition, to Mr. Micou, who conveyed it, subject to the same condition, to the Las Ovas Company. Senora Acosta had not acquired title to the Cayo Macagua and the $500.00 was therefore properly deducted from the face of the mortgage held by her, when it was discharged.

Q. Assuming that you paid Madame Acosta all the money she received for the land except $5,000.00 and the interest payments, what was the actual purchase price of the land from her? A. $19,500.00.

Q. You have referred to this as a sale by Senora Acosta to Escalante, what knowledge have you that the transaction was really a sale from her to him? A. I have seen the deed, and have it in my possession, by which the sale was effected.

Q. Under the Cuban Law, is the deed conclusive? A. It is.

119 Cross-examination:

Q. You have read General Reid's testimony in this case, have you not? A. Yes sir.

Q. He says that you translated to him the deed of Senora Acosta to Escalante and the deed of Escalante to Micou; were these payments you have described, made before or after that translation? A. It is my present impression, that they were made after I had read the deeds in English to General Reid.

Q. Do you know Claudio Gonzales Mendoza? A. Yes sir.

Q. What is his profession, and where does he live? A. He is a lawyer living in Havana.

Q. What is his professional standing in Havana?

This is objected to as in no way responsive to the direct examination, as wholly incompetent for any purpose, and as a point upon which if competent at all. Notice is given that the defendants' counsel will be held to the rule that he is making the witness his own.

A. So far as I know, he is in good standing as a member of the Cuban Bar.

Redirect:

Q. Will you state what effect under the Cuban Law, discovery of the fact that the price of the land had been secretly or fraudulently increased to the purchaser by t-e interposition of Escalante, between the real seller and the real purchaser, would have upon the validity of the $2,500.00 Escalante mortgage? A. No effect whatever so far as the obligation of the Las Ovas Company was concerned.

120 Q. Will you please explain more fully? A. Mr. Escalante as owner of the property, conveyed all of his ownership, to Mr. Micou, and Mr. Micou executed the mortgage for $2,500.00 in favor of Escalante from the moment when that deed to which Escalante and Micou were the parties, was signed, Mr. Micou became owner of the property for himself and in his own right, and the mortgage executed by him became a valid charge against the prop-

erty, there was no relation of contract and no privity as shown by the deeds between Senora Acosta and Mr. Micou. When subsequently Mr. Micou through his Attorney in fact, Mr. Mendoza conveyed the property to the Las Ovas Company by a deed in which that Company was represented by its attorney in fact Mr. Davis, the title to the land passed from Mr. Micou to the Corporation subject to all existing encumbrances, and there was no privity between Mr. Escalante and the Las Ovas Company.

Q. Suppose Mr. Escalante was a mere employee or Agent in the matter, of Mr. Davis, and that Mr. Davis, Mr. Mendoza, and Mr. Micou were all really agents and attorneys for the Las Ovas Company to be formed throughout the transaction, would those facts under the Cuban Law have enabled the Company to refuse payment of the mortgage to Escalante? A. No, the rights and obligations of the several parties would be determined by the statements set forth in these several deeds which I have referred to. It would be theoretically possible to recover for losses or damages suffered by reason of breaches of trust, at the end of an action at Law depending upon evidence showing a state of facts not disclosed by the deeds, but the deeds themselves would remain in effect.

121 Re-cross examination:

Q. Have you been admitted to practice Law in the Cuban Courts. A. No sir.

Further, witness saith not.

J. E. RUNCIE.

REPUBLIC OF CUBA, *City of Habana:*

I, the undersigned, Joseph A. Springer, Commissioner, do certify, that James E. Runcie, the witness, personally appeared before me on the twenty-sixth day of April, 1906, at the office of the U. S. Consulate General at Habana, at three o'clock in the afternoon, and after being first duly sworn to testify the truth, the whole truth and nothing but the truth, did depose to the matters contained in the foregoing deposition, and did in my presence subscribe the same.

And I further certify that I have subscribed my name to each half sheet thereof.

And I further certify that James E. Runcie and J. J. Darlington, appeared in behalf of the Complainant, and Samuel A. Putman appeared in behalf of the Defendant.

JOSEPH A. SPRINGER,
Commissioner.

122 CLAUDIO G. MENDOZA, a lawyer of Havana, 44 years of age, a witness examined in behalf of the defendant, being duly sworn, deposes and states as follows:

Q. Are you a member of the Bar of Cuba? A. I am, and have been since the year 1883.

Q. Do you know Mr. Davis, Mr. Phillips, Mr. Micou and General Reid? A. I do.

Q. State whether or not you are Mr. Davis's lawyer in Cuban matters. A. I am.

Q. How long have you been his lawyer? A. Since Mr. Davis came to Cuba, several years ago.

Q. If you were engaged by any one to examine the title and proffessionally supervise the transfer of the "Las Ovas" property involved in this suit, please state when it was, who employed you, and what you did in the matter. A. I was employed by Mr. Phillips and Mr. Davis in the early part of the year 1904, I had several interviews with the attorney for the vendors and examined the titles that were presented to me and others that I requested, as well as a certificate from the Register of Pinar del Rio and I prepared the deed of sale and gave all other professional information that was requested of me.

Q. Was that relative to the transfer to Escalante that you gave this advice? A. I gave advice in general as to the purchase of the property, and only when the deed was to be signed did I know that the first transfer was to be made to Mr. Escalante.

123 Q. Did you also supervise the transfer to the Las Ovas Company? A. I did.

Q. When you investigated the title to this property, if you gave an opinion to any one, state to whom it was? A. I gave an opinion to Messrs. Phillips and Davis, also to Micou and answered all the questions that was asked me concerning the titles, incumbrances, etc., on the property, but I did not then give an opinion in writing because I was told that it was not necessary. About two months later Phillips asked me to make a report about the titles to be sent to General Reid and I made that report and sent it to Mr. Phillips. Some time later General Reid saw me in the matter. I explained to him the whole situation of the titles and the incumbrances on the Las Ovas property. I saw that he was not cognizant with the titles and asked him if he had not received a report that I had sent to him and he said that he had not and I then gave him a copy of that report.

Q. I hand you a paper headed, "Report on the title to the property called "Sobrantes de la Hacienda Demolida Las Ovas," and ask you what it is? A. This is the report I gave Mr. Phillips for General Reid, and of which subsequently I gave a copy to General Reid.

Q. When did you give this to General Reid? A. I believe that it was in the early part of 1905.

124 Mr. PUTNAM: I offer this paper in evidence and ask that it be marked "Mendoza Exhibit No. 1."

Q. I now hand you a copy of a letter purporting to have been written by you to General Reid, dated January 14th, 1905, did you write that letter? A. I did write it on that date.

Q. Did you send it to General Reid? A. I did.

Mr. PUTNAM: I offer this letter in evidence and ask that it be marked "Mendoza Exhibit No. 2."

Q. I now hand you a copy of a letter purporting to have been writ-

ten by you to General Reid dated, January 19th, 1905, and ask you what it is? A. I wrote that letter on that day and sent it to General Reid.

Mr. PUTNAM: I offer this letter in evidence and ask that it be marked "Mendoza Exhibit No. 3."

Q. Are the statements contained in your report of the title, which has already been attached to your deposition marked "Exhibit No. 1," true as concerns the title? A. They are.

Q. What in your opinion is the extent in money of the incumbrances shown by that report? A. Some $7600.00, out of which $2200.00 were undoubtedly on the property and the balance of $5400.00 were doubtful because they are an incumbrance on the total of the original "Las Ovas" property and the vendors claim that these incumbrances were not really on the tract they were
125 selling and that they had not paid it for many years; that they had not paid for many years the interest on same.

Q. When you were employed to investigate this title, was Mr. Micou present? A. No, he did not come until later when the deed was to be signed, but I then explained to him the whole situation.

Q. When did you first meet General Reid? A. I do not remember exactly but I believe it was some time before the purchase of Las Ovas.

Q. Did General Reid make any inquiries of you in regard to the title to the property prior to the purchase of Las Ovas? A. Not that I remember.

Q. Were you asked by any one to conceal from General Reid anything concerning the title to the property? A. No.

Q. Please explain what is meant in Cuban law by a "censo"? A. A "censo" is an incumbrance on real-estate, representing a given amount on which a yearly interest is paid and the principal can never be claimed by the owner of the incumbrance, but it can be paid off at any time by the debtor and obtain the cancellation.

Q. What is the difference between a "censo" and a "capel-
126 lania"? A. A "capallania" is a legacy left by some person for the purpose of having the interest on same devoted to "saying mass," for his soul, or for some other religious purpose and said "capellanias" usually are in the form of "censos" on real-estate, therefore there is no substantial difference between a "censo" and a "capellania" as far as an incumbrance on real-estate is concerned; the only difference being in the destination of the interest, because a "censo-" as a rule are owned by private individuals and "capellanias" are held by Churches or other religious institutions or individuals who have to devote a large portion of the income to "saying mass."

Q. Do you know what per cent. was provided to be paid by the *censos* on this Las Ovas property? A. 5% a year.

Q. Do you know what the usual price at which *censos* can be redeemed or cancelled on country property where the *censos* bears 5% interest? A. Until recently the *censos* on country property were cancelled for 25 or 33% of their face value, but recently they

have increased in value and sometimes even 50% is now paid for them.

Q. What was paid at the time that these deeds we refer to and give what was the usual price at the time these deeds were paid? A. I consider 33 or 40 per cent. would have been the price then.

127 Q. Did you give a verbal report to Mr. Micou on the title to this property prior to the execution of any deeds we have referred to? A. I did.

Q. What did you tell Mr. Micou? A. I explained everything that he asked me, gave him my opinion of the title and answered such questions as he propounded, not only concerning the title but the *censos* and offered a written report which he said was not necessary at the moment.

Q. Did you tell him about all the *censos* that you found? A. I did.

Q. It appears from the deeds that Escalante had a mortgage on the Las Ovas property to secure the payment of $2500.00 falling due March 25th, 1905; if the Las Ovas Company had discovered that mortgage and the date it represented were procured by fraud practiced on the part of Escalante, or any one acting for him, is it possible under the Cuban law for them to have refused a payment of the debt and secure the cancellation of the mortgage? A. The Company might have refused the payment of the mortgage by instituting criminal proceedings to show that some fraud had been committed and then the Judge might have stopped the foreclosure proceedings established on behalf of the mortgagee

128 and the Company might also have stopped payment by instituting civil suit to obtain the collection of the mortgage, although such civil suit would not have stopped the foreclosure proceeding, it would have stopped the payment to the creditor unless such creditor should give a suitable bond until the civil suit had been decided.

Q. It appears from the deeds that the certificate of the Registrar of Property was not required; will you explain what that means? A. The certificate from the Registrar of Pinar del Rio was brought at my request, but finding therein that the *censos* which the vendors claimed did not pertain to the Las Ovas property were mentioned in this certificate I advised that it be not attached to the deed because in this manner the purchasers might disclaim payment of those *censos* and try to cancel, whereas if the certificate was attached and they admitted the existence of the *censos*, they could not refuse subsequently to pay their yearly interest.

Q. The deed of Madam Acosta to Escalante refers to all of the *censos*, I will ask you whether or not Madam Acosta insisted on that reference? A. Her representative did because there were added I think some land, about 30 caballerias or 1,000 acres if I re-

129 member correctly, to the original tract that was sold without increasing the price in order to have the purchaser assume the responsibility that might come from the *censos* amounting to $5400.00.

Q. Did the subsequent deeds acknowledge the *censos* or any of

them as incumbrances on the property? A. The subsequent deeds only state that there are *censos* of which the purchaser is cognizant and this was done by my advice in order to make it easier for the purchasers to disclaim the existence of the $5400.00 *censos* and only pay those that really ought to incumber the property should sufficient evidence be brought to show that for a long period the yearly interest had not been paid.

Cross-examination by Major JAMES E. RUNCIE:

Q. Are you familiar with the whole course by which the title to the property in question in this suit passed from Madam Acosta to the Las Ovas Company? A. I am, as far as the legal part is concerned.

Q. How many deeds of conveyance were executed within the course of that transfer of that title? A. Three deeds; one from Madam Acosta to Escalante; another one from Escalante to Micou and the other one from Micou to the Las Ovas Company.

130 Q. You have testified that you drew the deed by which Madam Acosta conveyed to Escalante; in whose behalf were you acting as Counsel at that time and in that transfer? A. I was acting on behalf of Messrs. Phillips and Davis, and also as I understood, for a Company which was being formed and which was represented by Mr. Micou, for although I was engaged originally by Messrs. Phillips and Davis, Micou told me that he would be satisfied by my report on the title and did not need to consult another lawyer.

Q. Neither Davis, Phillips nor Micou were parties to that deed were they in any capacity? A. Not to the first deed.

Q. In the preparation of that deed did you act as Counsel for Escalante? A. I did not.

Q. Then so far as that deed is concerned you were not Counsel for any party to it? A. I was in one sense, because I understood that Escalante was representing in some way the parties represented by Messrs. Davis and Phillips.

Q. Did you understand in what way he represented Davis and Phillips or their associates? A. No.

131 Q. Had you any previous acquaintance with Escalante? A. I had met him several times but no business connections.

Q. When did you first learn that Escalante was to take title to the property? A. About a day or two before the execution of the deed.

Q. Does the deed show that Escalante took anything but absolute title in himself to the property? A. It does not.

Q. Does it show that in taking title for himself he was taking for any other party or parties? A. No.

Q. It is then an absolute deed of sale to Escalante? A. It is.

Q. Who informed you that Escalante would be the grantee under the first deed? A. Phillips or Davis, I do not remember which.

Q. Was any statement made at that time as to why the course of the transfer of the property had been taken so as to make Escalante the grantee? A. As I remember there were two reasons; one was that it was better to have an intermediate purchaser for the purpose of facilitating the non-acknowledgment of the *censos* and the second

reason was, as I believe that Escalante was buying for one price and selling for another.

Q. Was there any legal objection to a conveyance directly from Madam Acosto to Micou? A. No legal objection but simply
132 a matter of convenience for the purpose above stated; for the purpose of the cancellation of the *censos*.

Q. Would not the cancellation of those *censos* have been equally well accomplished by a conveyance to Micou on the same terms and conditions as the conveyance to Escalante? A. Probably not because Mrs. Acosta wanted it mentioned in the deed the possible existence of the *censos* and we did not want Micou to assume them directly or indirectly, and it was better therefore to have a double sale of the property made mentioning the *censos* in the first one as Mrs. Acosta wanted and omitting them in the second deed by simply making a general reference to the same.

Q. If the first conveyance had been made to Micou on the same terms and conditions as that which was made to Escalante and if Micou had then conveyed to the Las Ovas Company on the conditions on which Escalante subsequently conveyed to Micou, would not the same result have been accomplished so far as the *censos* are concerned? A. Probably yes, but the larger the number of sales in which the *censos* are omitted, the better the right of the purchaser to disclaim them.

Q. Then so far as the legal status as Escalante as purchaser from Madam Acosta and that of Micou, if he had purchased from
133 Madam Acosta directly are concerned, there was no legal difference? A. No.

Q. You were acting at this time as Counsel for Micou? A. I was.

Q. Did you advise Micou that there would be no legal difference between the effect of the conveyance to him and the conveyance to Escalante? A. I explained to him the advantage on account of the calcellation of the *censos* above stated.

Q. You have testified that Escalante was to buy from Madam Acosta at one price and sell to Micou at another price; did you know what were the two prices involved? A. I did not until the deeds were signed and I believe there was a difference of $15,000.00.

Q. Did you advise Micou that the introduction of Escalante would result in an increase of price to him? A. I did not because the price at which Micou was buying was the one stated in his deed. I did not know the lower price that Madam Acosta was making to Escalante until the deed was signed.

Q. Before you drew the second deed by which Escalante conveyed to Micou did you know? A. I did not know. I only prepared the first deed leaving the name of the purchaser in blank and the second deed was prepared by the Notary as a consequence of the first one.

134 Q. What length of time elapsed between the signing of these two deeds? A. A few minutes.

Q. The deeds were prepared together and were both ready for signature at the same time? A. Yes sir.

Q. Did you at that time know the real purchasers of the property?

A. I knew it was a Company that was being organized and which Micou represented.

Q. Did you know that Davis and Phillips were to be share holders in that Company? A. I did not.

Q. Did Phillips or Davis undertake to represent the Company which was being formed? A. They said that a Company was being formed, but I did not know that they represented it until subsequently when the Company was organized and a power-of-attorney conferred.

Q. Have you ever acted as Counsel for the Las Ovas Company, incorporated? A. I did, at the request of General Reid in giving him some advice after the original conveyance.

Q. You have testified that you were told that your opinion in writing as to the title for this property was not required; who told you that? A. Micou.

Q. You have testified that you gave a copy of your opinion
135 in writing to Phillips; was that given to Phillips for himself or for anybody else? *Q.* I gave him my original report for General Reid at the written request of Phillips.

Q. Did you understand at that time that Phillips represented the Company which was to be formed? A. I knew he had some connection with the Company.

Q. Did you know that he was interested in the purchase—that he would contribute to the purchase price? A. No.

Q. Did you not give him that copy then to be presented to General Reid? A. I did, and I sent it to him with a letter, saying that it was for General Reid.

Q. In forming this opinion which you gave in writing as to the title to the property, what evidence did you have as to the invalidity of some of those censos which are referred to in your opinion? A. None whatever, except the statement of the vendors and for this reason a suitable compensation was required from them in the nature of an increase in the amount of land included in the price.

Q. Are you certain that it resulted in an increase of an area or a diminution of the price? A. Increase in the area. I do not remember whether there was a diminution in the price.

Q. Now when you reported that the title to this property
136 was good did you refer solely to the ownership of the property without regard to incumbrances? A. I referred to the title because the incumbrances did not affect the validity of the title and the question of incumbrance was to be dealt with separately. On examining titles we only refer as a rule to the ownership of the property but do not take into consideration the incumbrances since the title may be good whether the property is incumbered or not, but on giving my report on the Las Ovas property I went into both questions.

—. You have testified that all *censos* are redeemable and that *censos* on country property are redeemable for much less than their face value. Is it obligatory on the holder of any *censo* to cancel it for anything less than its full value? A. It is not.

Q. Did you find that all the *censos* referred to in your report were

of record against the property in the Registrar of Property at Pinar del Rio? A. I do not remember whether they were all recorded in separate entries as required by law, or if some of them were only mentioned in the certificate, but reference was made to all of them in such certificate.

Q. You refer in that answer to the official certificate of the Registrar of Property at Pinar del Rio? A. I do.

Q. Was it from that certificate that you derived all your
137 knowledge of the existing incumbrances of record against the property? A. From that certificate and from the deeds of sale that I had examined.

Q. What was the date of that certificate? A. March 24th, 1904; the day before the deed of sale was signed.

Q. Would any declaration of omission in any deed executed at that time affect the interests of the holders of those *censos* at that time? A. It might because if the purchaser admitted an incumbrance on a property he couldn't disclaim it but if he does not assume the existence of a mortgage he may subsequently institute proceedings to have such incumbrances cancelled if there are reasons for it.

Q. At what time could such proceedings be instituted for the cancellation of a recorded incumbrance by reason of lapse of time only? A. After thirty years, that is to say; the purchaser of an incumbranced property can, at any time establish a claim against the owner of a *censos* to prove that he had not collected interest for thirty years and to have said *censos* cancelled in consequence of the Statute of Limitation.

Q. So that the whole omission of reference to these *censos* in the deeds of March 25th, made no immediate change in the legal
138 rights of the owners of such *censos?* A. None.

Q. So that if Micou had taken the property direct from Madam Acosta and had then conveyed to the Company and the Company had not acknowledged the *censos* of record, the Company would have been in the same position with respect to those *censos* as Micou was after he secured the deed from Escalante? A. Yes sir.

Q. You are familiar with all three of the deeds? A. I am.

Q. Is there in any of those deeds any evidence of fraud on the part of any party? A. I do not know of any.

Q. Is there any evidence of any criminal action on the face of the deeds on the part of any party to those deeds? A. None that I know of.

Q. So that the deeds themselves furnish no evidence for the institution of a proceeding to set aside the mortgage in favor of Escalante for fraud? A. No.

Q. If such an action were instituted would it be what is called in Cuban Law a "declaratory action?" A. Yes, if it were established as a civil case.

Q. How long in the original course of procedure would it take to reach a final decision in such an action in the Cuban Courts? A. It would take between one and two years, but the payment
139 to the mortgage creditors could be stopped in the meantime.

Q. Is there any evidence in any of these deeds on which a

criminal prosecution could be instituted against anybody? A. I do not believe there is.

Q. If there was ground for a criminal proceeding would the relief against the application of the mortgage be merely ancillary to the criminal proceeding in the Cuban Court? A. If while a foreclosure suit is pending a criminal proceeding is instituted which may involve the validity of the mortgage, a criminal judge notifies the foreclosure judge to stop the foreclosure suit, then if the criminal suit results in a conviction which involves the invalidity of the mortgage the criminal court passes a decree which annuls the mortgage.

Q. Do you remember whether in the deed from Micou to the Las Ovas property the mortgage in favor of Escalante was expressly acknowledged? A. It was.

Q. I understand, Mr. Mendoza, that it was through this registration certificate of March 24th, that you learned of these *censos* and there was an increase of the land conveyed as you remember? A. Yes sir.

Q. This increase was then determined upon between the
140 24th and 25th of March? A. I believe that the question had already been discussed prior to that because we had some knowledge of the *censos* but it was not finally agreed upon until the last moment to the signatures of the deed.

Q. And when was the additional amount of the land agreed upon? A. I believe it was the same day of the signing of the deed, or a day before.

Q. I find attached to the original deed from Madam Acosta to Escalante a blue print showing the land conveyed; at whose instance was this blueprint prepared? A. I suggested the convenience of having a copy attached to the deed and I suppose that Phillips and Davis attended to it.

Q. A map of the land that was to be conveyed? A. Yes sir.

Q. The blue-print simply shows the boundaries without any correct survey? A. Yes sir.

Q. And that was within a day or two of the execution of the deed as you remember it? A. Yes sir.

Q. How long before March 25th, were you engaged to examine this title? A. I suppose a month or two.

141 Q. As long as that? A. Yes, sir.

Q. You state in your direct examination that you only knew when the deed was to be signed that Escalante was to be the first purchaser; how long before the signing of the deed did you know that? A. I believe the day before.

Q. Who told you? A. Phillips or Davis.

Q. Did they tell you why? A. I already stated the reasons.

Q. I am asking now what reason Phillips or Davis gave you for making Escalante the first purchaser? A. Because Escalante was a man in whom they had confidence and there was to be some intermediate purchaser.

Q. That was the reason they gave you, was it? A. I believe it was, although I do not remember exactly why Escalante came in.

Q. You knew, did you not, that the making of the two deeds would surely increase the cost? A. I did.

Q. Did Micou tell you that it was not necessary to give written opinion or that you need not give it at that time; that you might do it later? A. That I might do it later.

Q. From whom did you learn that Escalante represented Davis and Phillips and other parties? A. I did not know that he represented them. I was told by them that he was to be the orig-

142 inal purchaser of Las Ovas.

Q. You said in your direct examination that you understood that Escalante in some way represented Davis and Phillips and other parties; my question is from whom did you understand that? A. From Davis and Phillips.

Q. Who was it he referred to as other parties? A. I do not know.

Q. You say they had confidence in Escalante; what confidence was involved in receiving title by one deed and making another simultaneously? A. He might not have signed the second one.

Q. And that was the confidence you understood as the reason that they selected Escalante? A. Probably.

Q. Why was a $2500.00 mortgage given to Escalante if he was a mere intermeditory? A. I do not know that. I was never consulted in the financial part of these things.

Q. How long before the signing of the deed was it that Mrs. Acosta insisted on having the censos mentioned? A. I do not remember, but I suppose it was the last two days previous to the signing of the deed.

CLAUDIO G. MENDOZA.

143 MANDOZA EXHIBIT No. 1.

Report on the Title to the Property Called "Sobrantes De La Hacienda Demolida Las Ovas."

On July 24th, 1886, before the Notary of Havana, Mr. Jose Miguel Nuno the inheritance left Mr. Carlos Tarafa y Fernandez was divided between his widow, Ana Acosta y Ceballos, and his children Carlotta, Elvira, Nilo, Adela, and Jose Ciro Tarafa y Acosta, the widow taking as part of her share the property called "Sobrantes de la Hacienda Demolida Las Ovas," situated in the municipal district of Pinar del Rio. It contains 199 caballierias and 99 cordeles, or about 6,644 acres, although there was a mistake in that deed, the surface measurement given being somewhat less than it was in reality, but this mistake was rectified by the widow and children according to the deed of March 25, 1904, whereby Mr. Gustavo Escalante purchased the property from Mrs. Ana Acosta vda. de Tarafa.

Mr. Carlos Tarafa y Fernandez acquired the property July 29, 1884, according to deed before the Notary of Pinar del Rio, Mr. Mateo J. Quintero, when the partnership of the firm of C. Tarafa y Rolando was dissolved. This firm was established May 18, 1878,

the partners being Carlos Tarafa and Chialfredo Rolando. Mr. Tarafa brought two-thirds of said property to the partnership as part of his capital and sold the other third to Rolando, who put it in as capital. Mr. Tarafa acquired complete title to the property on April 20, 1878, by deed before the Notary of Havana, Mr. Joaquin Abenza y Molina, on the dissolution of the firm of Mr. Tarafa y Hermano, which he formed with his brother Miguel. They
144 acquired it from Mrs. Irene Hidalgo Gato, Mrs. Juana de Dios Ayala, and others as shown by deed of October 16, and Nov. 5, 1863, before the Notary of Pinar del Rio, Mr. Pablo Garcia.

As will be seen from this data the title has been investigated as far back as forty years, which gives complete protection to the purchaser for, according to our laws, no claim holds good after thirty years, and consequently should there be any flaw in the title previous to 1863 the purchaser could not be deprived of the property for the claim would be debarred by the Statute of Limitation.

When the property was divided in 1886 between the widow and children of Carlos Tarafa a mortgage for $5,069.38 was instituted in favor of Adela Tarafa y Acosta and one for $7,979.38 in favor of Jose Ciro Tarafa y Acosta, but these were cancelled on March 25, 1904, according to deed before the Notary Arelano, in so far as the land transferred to Mr. Escalante is concerned, the boundaries of which were determined and shown in a map attached to the deed. The exact surface was not known, as it had not been measured, but is about two-thirds of the whole amount held by Mr. Tarafa.

The property "Las Ovas" originally contained over 300 caballieras, but several sales were made aggregating 166 caballieras and a fraction, only 199 caballieras 99 cordeles remaining. When signing the deed of March 25, 1904, the exact boundaries of the various lots thus sold were not known, but the seller guaranteed that not more than 30 caballieras were within the boundaries given in the deed.

Within the boundaries of the land purchased by Mr. Escalante and which he sold to Mr. Micou there are three caballieras and 108 cordeles, or about 118 acres, which bear an incumbrance or
145 censo of $1,333 and another lot of two caballieras, or about 66½ acres which bears an incumbrance of $900. Both are accepted by the purchaser and will have to remain on the property or be cancelled by him.

At the time of signing the deed other incumbrances appeared burdening the original estate, that is the 300 caballieras but the Tarafa family have never accepted those liens nor paid the annual interest and consequently they consider that those censos should be acknowledged in full on those portions of the original hacienda "Las Ovas" which belong to other parties. But as this may not perhaps be legally possible Mr. Escalante succeeded in having some land added to the lot originally purchased, about 30 caballieras, in compensation for the risk which the purchaser incurs in having to accept or cancel those liens which amount to $5400, and pay the interest of five per cent. per annum for five years, as all prior annuities uncollected would be debarred by the Statute of Limitation. I un-

derstand that a survey is now being made of the property, and thus the exact measurement will be determined, but this report refers only to the legal aspect of the title. I consider the title good, and that the only point wanting to make it perfect is the survey and perhaps the cancellation of the incumbrances.

(Sd.) CLAUDIO G. MENDOZA.

Havana, May 30, 1904.

Copy.

At the execution of a commission for the examination of witnesses between The Las Ovas Company, Inc., *versus* Norman H. Davis, *et al.*, Defendant, this exhibit marked and numbered "Mendoza Exhibit No. 1," was produced and shown to the witness, Mr. Claudio G. de Mendoza, and by him deposed unto and subscribed by him at the time of his examination, before me.

CLAUDIO G. MENDOZA.

JOSEPH A. SPRINGER,
Commissioner.

146 MENDOZA EXHIBIT No. 2.

HAVANA, *January* 14, 1905.

General Geo. C. Reid, Prado 110, Havana.

DEAR SIR: In reply to your querries concerning the Las Ovas property I beg to state:

1st. That the Las Ovas Company need not necessarily be registered in Cuba in order to carry on its business of buying and selling property, giving deeds thereof, etc. A power of attorney executed by the proper representative of the Company pursuant to the resolution of the board of directors, provided of course that the resolution of the board of directors and the authority to grant the power be shown in the power.

2nd. Of course the Company can be registered also in Havana by bringing a copy of its charter and by-laws, and the certificate of the Cuban consul to the effect that the Company is duly organized according to the laws in force in Virginia where it was incorporated. This recording would be necessary for commercial transactions here, but for the mere purchase and sale of land it is not indispensable.

3rd. The deeds for the transfer of property in Cuba should, preferably be made here, to make sure that they comply with all the laws in force in the Island, but they may be executed in the United States if it is deemed more convenient. In such an event a draft could be made for the deeds, which could be printed in Spanish and English, care being taken that the official copy for use here
147 be the Spanish one, and that it bears the authentication of the Cuban consul. This authentication is common to all documents that come here, and on executing the deeds here only the power of attorney would have to be authenticated, and with

this power any number of deeds may be executed. But if the deeds are executed in the United States each one must bear said authentication, as it is a separate document.

4th. The censos encumbering the Las Ovas property which the company has acquired are especially two, one of $900 and one of $1,333 on two and 3½ caballierias respectively, or say 66 and 100 acres, or the portions known as Cayo del Junco and Vega Jupiter in Cayo del Roble. Besides these there are five others which are a lien on the whole of the original estate of which the Company only bought a part. These are one of $1800 in favor of the capellania or church rent of Cristobal Rodriguez Camejo; one of $1,279.50 in favor of the capellania of Lorenzo de Urra; one of $1000 in favor of the Archicofradia of the Santissimo Sacramento, which is worshipped in the Cathedral; one of $1000 in favor of the Convent of Santa Clara, and another of $325 in favor of the Government, which may perhaps belong to the church now, because of certain deeds executed between the Church and the military governor of the Island some time ago.

5th. Censos do not constitute a defect in title in any degree, but are simply an incumbrance on the property bearing them, and only an annual interest of five per cent. has to be paid. The owners of the property are never compelled to pay off the principal. On the contrary they may cancel them whenever they think best by paying the principal in full. Such cancellation is often made at a much lower rate, and perhaps 50% *per cent.* of the nominal amount by agreement with the owners of the censos.

6th. Censos are a kind of ground rent, and their existence
148 does not deter a Cuban purchaser from acquiring the land, for almost all of the estates in Cuba are incumbered in this manner. They are very seldom cancelled because the rates of interest here are higher than 5%, and consequently nobody pays off the principal unless by special agreement with the owners of the censos, and by securing a great reduction from the nominal amount.

7. In order to cancel them it would be necessary to enter into negotiations with the owners and to acquire them in full or acquire the right to same and cancel them so far as the property owned by your Company is concerned, and negotiate with the owners of the remainder of the estate for the payment of the yearly interest, or for the cancellation of their proportionate part. This of course will take some time, but I see no objection to the Company proceeding to sell the land it holds, and with the purchasers take upon itself the obligation to cancel the censo within a reasonable time, which I would not make less than one year, in order to provide for emergencies.

Should you wish for any further information on this subject I shall be pleased to furnish it.

Yours very truly,

(Sd.) CLAUDIO G. MENDOZA.

P. S.—The censo of $900 belongs to Mr. Jose MaGil, but I do not know to whom that of $1,333 belongs.

At the execution of a Commission for the examination of witnesses between "The Las Ovas Company, Inc., *vs.* Norman H. Davis, *et al.* this Exhibit marked and numbered "Mendoza-Exhibit No. 2" and hereto annexed, was produced and shown to the witness, Mr. Claudio G. de Mendoza, and by him deposed unto and subscribed by him at the time of his examination before me:

CLAUDIO G. MENDOZA.

JOSEPH A. SPRINGER,
Commissioner.

149 MENDOZA EXHIBIT No. 3.

HAVANA, *January* 19, 1905.

Gen. Geo. C. Reid, Prado 110, Havana.

DEAR SIR: Continuing my letter of the 14th inst. in regard to the Las Ovas property, I wish to state that the vendors have not for many years paid the annual interest on the $5,400 of censos which encumber the original estate. On Nov. 6, 1860, the then owners of Las Ovas, who also owned some censos, in a deed before the Notary of Pinar del Rio, José Francisco Ramos, destined two of them, which encumbered the properties of José Diaz Martinez and Josefa Guerra, to the payment of that portion of the general censo on Las Ovas, which had to be paid by the persons signing the deed, the yearly interest on the censos destined for this purpose amounting to $260. Mr. Ramon Duarte, one of the parties interested in that deed, undertook the collection of this yearly interest, which was to be paid by José Diaz Martinez and Josefa Guerra, and to pay the proportionate interest on the $5,400. When Mr. Duarte died Mr. José Salazar y Hernandez undertook this obligation, and when he died his son, Dr. Emilio Salazar, of Pinar del Rio, took it up and has since attended to the collection and payment. Consequently the vendors of the property now held by the Las Ovas Co., have never been molested by the owners of the censos, and should they try to collect from the company they should be referred to Dr. Emilio Salazar.

150 I do not know in whose name these two censos appear in the Property Registry, and this matter will have to be investigated, but the fact is that Mr. Duarte formerly, and now Dr. Salazar, is not obliged to cancel the principal of the censos encumbering Las Ovas, but only to pay the yearly interest with the interest of the two censos destined for the purpose.

Your company wishes to cancel the censos on Las Ovas, and consequently some arrangement will have to be made with Dr. Salazar and with the other owners, and the suggestion has been forwarded that if the Las Ovas Company should furnish $1,250 to be added to whatever sums the others may furnish, the $5,400 of the censos might be cancelled.

Yours very truly, CLAUDIO G. MENDOZA.

Copy.

At the execution of a Commission for the examination of witnesses between "The Las Ovas Company, Inc., *vs.* Norman H. Davis, *et al.*, this Exhibit marked and numbered "Mendoza-Exhibit No. 3" and hereto annexed, was produced and shown to the witness, Mr. Claudio G. de Mendoza, and by him deposed unto and subscribed by him at the time of his examination before me.

CLAUDIO G. MENDOZA.

JOSEPH A. SPRINGER,
Commissioner.

151 REPUBLIC OF CUBA,
City of Habana:

I, the undersigned, Joseph A. Springer, Commissioner, do certify that Claudio G. Mendoza, the witness, personally appeared before me on the twenty-seventh day of April, 1906, at the office of the U. S. Consulate General at Habana, at nine o'clock in the forenoon, and after being first duly sworn to testify the truth, the whole truth and nothing but the truth, did depose to the mattters contained in the foregoing deposition, and did in my presence subscribe the same, and endorsed the exhibits thereto.

And I further certify that I have subscribed my name to each half sheet thereof, and to each exhibit.

And I further certify that James E. Runcie and J. J. Darlington appeared in behalf of the Complainant and Samuel A. Putman appeared in behalf of the Defendant.

JOSEPH A. SPRINGER,
Commissioner.

152 HARRY H. NORTON, thirty-six years of age, occupation horticulturist, called on the part of the defendant, deposes and says:

Direct examination by Mr. PUTNAM:

Q. How long have you lived in Cuba? A. About six and one-half years.

Q. What part of Cuba do you live in now? A. At Palacios, in the Province of Pinar del Rio.

Q. Do you know the property of the Las Ovas Company in Pinar del Rio? A. In a general way, yes sir.

Q. How far is the place where you now live from the Las Ovas property? A. I should say about 25 miles.

Q. In what business have you been connected during your residence in Cuba? A. In horticulture and general contracting, building and such like.

Q. Have you had occasion to know the values of orange lands in the Province of Pinar del Rio? A. Yes sir.

Q. How much experience have you had in buying and selling and knowing of the buying and selling of orange lands in that Province? A. Why I have known of land being bought and sold for the culture of oranges for the last four years, I think.

Q. Have you bought or sold any lands yourself in that time? A. Yes sir.

153 Q. What land was that? A. We bought 115 acres at Palcios for our own use?

Q. Whom do you mean by we? A. The Norton Brothers Company.

Q. Do you know the Buckeye property? A. Yes sir.

Q. State whether your are interested in that? A. In a way we are.

Q. In what way? A. We have a contract with the Buckeye people to plant their property in oranges and care for it for three years.

Q. Do you know the Herradura property? A. Yes sir, I have been over it thoroughly.

Q. Have you ever been on the Las Ovas property? A. Yes sir.

Q. State when and how much of it you saw? A. I have ridden over the property horse back and cannot tell you just when it was; probably three years ago and then I have passed through it a good many times by the railroad.

Q. State what in your opinion the property now owned by the Las Ovas Company was worth in March, 1904? A. That was two years ago; I should think it would be worth $10.00 an acre.

Q. What do you consider that property worth now? A. I think it has increased 50%—worth $15.00 at a low estimate.

154 Cross-examination by Mr. JAMES E. RUNCIE:

Q. Do you know how much land there is in the Las Ovas Company? A. Well no, but I think that my Brother told me when he went out with General Reid to look over the property there was about five or six thousand acres.

Q. In your experience in dealing in lands in Pinar del Rio Province, have you not found that the price per acre of large tracts is much lower than the price per acre of small tracts? A. Why yes that I think is generally true.

Q. You say that you are familiar with the land of the Herradura Land Company? A. Yes sir.

Q. Do you know how much that Company paid for that land? A. No.

HARRY H. NORTON.

155 REPUBLIC OF CUBA,
City of Habana:

I, the undersigned, Joseph A. Springer, commissioner, do certify, that Harry H. Norton, the witness, appeared personally before me on the first of May, 1906, at the office of the U. S. Consulate General, at quarter past four o'clock in the afternoon, and after being first duly sworn to testify the truth, the whole truth and nothing but the truth, did depose to the matters contained in the foregoing deposition, and did in my presence subscribe the same.

And I further certify that I have subscribed my name to each half sheet thereof.

And I further certify that James E. Runcie and J. J. Darlington

appeared in behalf of the Complainant and Samuel A. Putman appeared in behalf of the Defendant.

JOSEPH A. SPRINGER,
Commissioner.

156 GOULD G. NORTON, 27 years of age, a nursery-man and orange planter by occupation, being duly sworn, and examined on the part of the defendant, deposes and says as follows:

Q. Do you know the property of the "Las Ovas" Company in Pinar del Rio? A. I do.

Q. How often have you seen that property? A. I could not remember the number of times I have been on the property, I examined it at one time with Mr. *Mr.* Davis and General Reid.

Q. Have you been on the property other times? A. I lived in Pinar del Rio for the first eight months in the year 1899, and have been over various portions of the property, and the immediate vicinity of the other lands adjoining.

Q. Do you own any property in that vicinity? A. No sir.

Q. In what business are you engaged? A. I am a nurseryman and orange planter.

Q. Where are you engaged in planteing oranges now? A. Throughout the Province of Pinar del Rio mainly.

Q. How much land are you now planting in oranges, or have under contract to plant? A. We have now under contract about 2000 acres.

Q. How long have you been engaged in this business? A. All of my life.

Q. How long in Cuba? A. We have been in Cuba doing business as nurserymen about two years.

Q. Who do you mean by "we"? A. Norton Bros. Company.

157 Q. Do you know the value of lands in the vicinity of "Las Ovas," and if so, how long have you known these values?

Objected to as an incompetent method of proving knowledge of values.

A. Yes during the last two years I have been conversant with a great many people who have bought lands in Pinar del Rio Province, and am familiar with the prices that have been paid.

Q. Do you know how many acres there are in the property of the "Las Ovas property? A. Not exactly, I think there are about 5,500 acres.

Q. What was that property worth in March 1904 or about that time.

Mr. Darlington objects on the ground that competency to testify as toe the values at that time or any time; hase not been shown.

A. As a conservative estimate I would say that the property was worth $50,000.00.

Q. What is that property worth now? A. I would place its value at $75,000.00.

Q. Have you any interest in that property? A. None at all.

Q. Are you related to, or connected in any way with Mr. Davis or Mr. Phillips? A. No, I am not.

Q. Have you any interest in this litigation? A. None at all.

Cross-examination:

Q. Please state, if you can, the date of the visit to "Las Ovas" which you have stated you have made with General Reid? A. Nearly two years ago.

158 Q. Can you tell in what month it was? A. No, not without referring to my note-book.

Q. Who else accompanied you on that visit? A. Mr. Davis and General Reid.

Q. Where did you start from? A. We took the train at the Cristina Station, Havana, and got off at Las Ovas.

Q. Were there no other persons in the party? A. None that I remember at this time.

Q. How long did you remain at Las Ovas? A. Time enough to get breakfast and secure horses.

Q. How long did you remain in the vicinity of Las Ovas on the company's lands, or thereabout? A. We remained on the land the remainder of that day, and I think, a portion of the next morning, we spent that night in Pinar del Rio.

Q. When did you leave Las Ovas? A. We took the train to return at Pinar del Rio at about 2 P. M. the next day.

Q. And this was something less than two years ago? A. Yes.

Q. Then it could not have been earlier than the month of May 1904, could it? A. I think not.

Q. And it may possibly have been later than May that year? A. It may have been.

Q. How late might it have been, in that year? A. I am not prepared to answer that question.

Q. Do you individualyly own any real property in Cuba? A. Individually no.

159 Q. Does the Norton Bros Co. own any? A. Yes.

Q. What is the acreage approximately of the land owned by that Company? A. About one hundred and ten acres.

Q. Is it free from encumbrances? A. It is.

Q. Where is it situated? A. Near the town of Palacios, in Pinar del Rio Province.

Q. How far is that from Las Ovas? A. About fourteen or fifteen miles.

Q. It is nearer to Havana than Las Ovas, is it not? A. It is.

Q. What price did you give for that property? A. $30.00 per acre.

Q. Was it improved or unimproved when acquired? A. It was unimproved, except four acres planted in tobacco.

Q. In making your estimate of the past and present values of the Las Ovas Company's land, did you consider the amount of any encumbrances on the land? A. The estimate is made without regard to possible encumbrances.

Q. Do you know of any encumbrances on the land of the Las Ovas Company? A. No.

Q. Do you know of any sale of lands near, or adjoining the Las Ovas tract within the last two years? A. Yes.

Q. Are you acquainted with Mr. Thomas Abbott? A. I know the gentleman by sight, but was never introduced to him.

Q. Do you know of a purchase made by Mr. Abbott and
160 his associates under the name of the Las Ovas syndicate? A. I know that Mr. Abbott is connected with the company known as the Las Ovas Syndicate. I do not know if he purchased the land.

Q. Do you know that the Syndicate purchased some land adjoining the land of the Las Ovas Company? A. I know that the Syndicate is offering for sale lands near the Las Ovas tract, but I do not know how they acquired them.

Q. If you should learn that the lands of the Las Ovas Syndicate were purchased by that syndicate less than one year ago at three dollars per acre approximately and that the lands so purchased were a part of the same estate of which the Las Ovas Company had acquired the remainder of, would you regard that as a reliable indication of the value of those lands at that time? A. I don't know how good judges Mr. Abbott and his associates are of land, and I am not prepared to say whether that would be a good indication of the value of the land as it might belong to the same estate and yet be worthless.

Q. Do you know the character of the lands immediately South of a lake on the lands of the Las Ovas Co.? A. Yes.

Q. Is there any difference in the general character of the land South of the lake, and that North of the lake? A. I think the lands laying towards Pinar del Rio, which would be the North, are more fertile.

Q. Were the boundaries of the Las Ovas Company's lands pointed out to you while you were there? A. They were pointed out
161 to me from time to time.

Q. When did you come to Cuba to establish yourself in business? A. About two years ago.

Q. Can't you tell in what month? A. I do not remember in what month it was.

Q. It may then have been less than two years ago? A. It may have been less.

Q. And before that time you have not been in Cuba since 1899? A. I have not been here since I left for Porto Rico, which I think was in the first part of 1900.

Q. Who requested you to go to Las Ovas? A. Mr. Davis and General Reid.

Q. For what purpose? A. They intended to plant out a portion of this estate, and I wished to secure the contract, of the planting and carrying out of the same.

Redirect:

Q. Has Norton Brothers Company improved the hundred and ten acres you say they own, and if so how?

Objected to as neither responsive in cross-examination nor of any materialyty in the case.

A. They have improved it by planting out portions of it in orange trees and other portions in nursery.

Q. What is it worth now?

Same objection.

A. It was not for sale.

Q. If Norton Brothers Company are interested in any other land in Cuba state in what way, and where the land is?

Same objection.

A. We are interested in the Buck-eye, whose lands are
162 situated in the Pinar del Rio Province.

Q. How much land has the Buck-eye Company, and for what purposes was it used?

Same objection.

A. About 1823 acres, and it is to be used for oranges, pine-apples and tobacco.

Q. What interest have Norton Brothers Company in the Buck-eye Company?

Same objection.

A. We have a contract to plant the entire estate.

Q. If you know what price the Buck-eye Company paid for that land, please state it.

I object until the source of knowledge is developed.

A. They paid $20.00 per acre for it.

Q. How do you know? A. Through conversation with various of the stockholders, as well as the seller of the land.

Q. How does that land compare with the land of the Las Ovas Company? A. Somewhat heavier in character, and not so suitable for fruit culture.

Q. Do you know at what price the Las Ovas syndicate with — Abbott is connected is offering its land? A. I cannot state positively, but I think it is being offered for $30.00 per acre.

Objected to, and motion to strike out.

Q. Do you know the lands of the Herradura Land Comp., situated at Herradura in Pinar del Rio Province?

Objection repeated.

A. Portions of them.

Q. How do the portions of that land that you know compare with the Las Ovas Company's property?

Objection repeated.

163 A. They are very similar, but I think not so fertile.

Q. Do you know of any sales that Company has made of the portions of their land with which you were acquainted?

Objected to unless other than the hearsay of it thus far given by this witness is shown.

A. Yes.

Q. Do you know the price at which they sold?

Same objection.

A. Yes, $40.00 per acre.

Recross:

Q. Do you own any stock in the Buck-eye Company to which you have referred? A. No.

Q. Does your company own any of that stock? A. Our company is to be paid a portion of the contract price for planting trees in stock.

Q. Have you received any stock yet? A. No.

Q. Then you have no relation with that company, except as contractors for planting and cultivating trees? A. That is all.

Q. Did you not make a proposition to the Las Ovas Company to make a similar contract through Mr. Davis? A. Yes, we made a proposition to plant a portion of their estate.

Q. Can you say when that proposition was made? A. No, I cannot say definitely when it was made.

Q. Was it rejected by the Las Ovas Company? A. It was.

Q. Do you know how much land the Las Ovas syndicate has sold at the price you have mentioned? A. I do not.

Q. Do you know whether they have sold any land? A.
164 I have heard that they had made sales from time to time.

Q. Of your own knowledge, do you know of any such sales? A. No I am not acquainted with the Las Ovas people, and cannot state if they have made any sales.

Q. Can you state positively that the Las Ovas syndicate is still doing business? A. I cannot state positively, but I think they are.

Q. Of your own knowledge do you know of any sales made by the Herradura company at the prices you have mentioned? A. Yes.

Q. How many? A. I cannot say positively, but I think 10 or 15 sales in the last three or four months.

Q. Were those sales of large tracts or small? A. Some of them of 40 acres and some of eighty.

Q. Do you know what the Herradura Company has expended in commissions advertising, and other expenses in connection with such sales? A. I do not.

Q. Can you make an estimate of such expenses as compared with the prices per acre stated? A. I can make no estimate of their expenditures.

Q. What is the source of your knowledge of the actual prices paid by the purchasers from that company? A. From the various purchasers, and from the manager of the company.

Q. Have you seen any of the deeds of sale? A. No, I can't state positively that I have.

165 Our objection is now repeated, as the *testimony's witness* as to values, on the ground that it is heresay, and incompetent.

And further the witness saith not.

GOULD G. NORTON.

GOULD G. NORTON, being recalled by the defendants and interrogated by Mr. Putman for the defendants, testifies as follows:

Q. When you left the stand the other day, you were uncertain as to the time when you visited the property of the Las Ovas Company. If you have since refreshed your recollection, give us more fully an account of your visit to the property, or of your visits, if there were more than one. A. Some place between the 15th of November 1904, and the 4th of December of the same year, I went to the property. I have some recollection of going with Mr. Davis and a man from Tennessee who was looking at the property. My account book shows that I charged up the expense for this trip on the 4th of December. I don't know whether the man from Tennessee was on this trip or not. I distinctly recollect going to the property with Mr. Davis and General Reid on another trip; I don't remember whether the trip with General Reid was the first or second trip; I know that he was along because I remember his complaint about getting up so early in the morning. My expense account shows nothing of this trip.

GOULD G. NORTON.

166 REPUBLIC OF CUBA,
City of Habana:

I, the undersigned, Joseph A. Springer, commissioner, do certify, that Gould G. Norton, the witness, personally appeared before me on the twenty-sixth day of April, 1906, at the office of the U. S. Consulate General at Habana, at four o'clock in the afternoon, and after being first duly sworn to testify the truth, the whole truth and nothing but the truth, did depose to the matters contained in the foregoing deposition, and did in my presence subscribe the same. And further was called in re-direct examination on the 7th May, at six o'clock in the afternon at the same place.

And I further certify that I have subscribed my name to each half sheet thereof.

And I further certify that James E. Runcie and J. J. Darlington, appeared in behalf of the Complainant, and Samuel A. Putman appeared in behalf of the Defendant.

JOSEPH A. SPRINGER,
Commissioner.

167 HABANA, CUBA, *April 27th*, 1906.

NORMAN H. DAVIS, 27 years of age, banker, of the City of Havana, Cuba, being first duly sworn and examined on the part of the defendants, deposes and says as follows:

By Mr. PUTMAN:

Q. State what your business is now Mr. Davis? A. I am First Vice-President and General Manager of The Trust Company of Cuba.

Q. Are you in any other business in Cuba? A. Yes, I am Vice-President and Secretary to the T. L. Huston Contracting Company;

a Director in an Insurance Company known as the Compania de Agricola de Cuba and Secretary of the Columbia, a Land Company.

Q. In what business were you engaged from about December, 1903, to the 1st of April, 1904? A. I was then Secretary of the Colonial Loan and Deposit Company, and Secretary of the Columbia Company; I also was a partner in this Contracting Company.

Q. If about December, 1903, you entered into a contract with Madam Acosta by which she gave you an option on the tract of land now belonging to the Las Ovas Company, or any portion of it, please explain how those negotiations began and what option you finally entered into.

By Mr. DARLINGTON: The latter part of the question objected to unless this option contract is produced.

168 A. Sometime during the latter part of 1903, Phillips and I decided to buy some land in Cuba and after inquiring around for some time to find a good piece of property we found the property belonging to the widow Acosta, and some time during the month of December, 1903, we entered into negotiations for this property, as the result of which we secured an option on a certain portion of that property lying south of the railroad and which was supposed to contain about 4,000 acres, at the price of $10,000.00.

Q. You saw the option draft that Tarafa produced and had marked Exhibit "A" Tarafa," and the plan of the property contained in that draft; please designate from that draft what portion of the property was included in the option you secured providing for the payment of $10,000.00? A. It included the property between the railroad, which is not marked on this draft and the line marked red line; the railway runs through the northern portion of the property.

Q. Is the railroad north or south? A. It is north.

Q. State whether or not that option given you was in writing? A. It was.

Q. Where is it? A. It was destroyed according to agreement with Tarafa subsequently on increasing the amount of property to the option.

169 What time was allowed you by this option to complete the purchase—that first option I mean? A. 60 days as I remember it.

Q. Do you remember the date of it? A. I do not except that I know that it was in the month of January, 1904.

Q. You have heard Mr. Mendoza's testimony that you put the examination of the title to the Las Ovas property in his hands; state when you did that? A. I think it was either in December, 1903, or during the first part of January, 1904.

Q. Do you know Benjamin Micou and General Reid? A. I do.

Q. State when you first met Benjamin Micou? A. During the month of December, 1903.

Q. Where? A. In the Hotel Inglaterra, Havana.

Q. If you engaged into negotiations with Micou concerning the Las Ovas property, state what negotiations and how they arose?

A. Mr. Phillips and I were walking up the Street by the Hotel Inglaterra and he told me that he noticed in the paper that Benjamin Micou, of Washington, was stopping at the Hotel and that he would like to stop in to see him, as he had known him for some time. We went in and Mr. Phillips presented me to Micou. I saw Micou several times after this and we got to talking
170 about orange properties and Micou said that he had an orange grove in Florida, which had not been much of a success on account of freezes and that he would like to have an orange grove in Cuba, and that he thought that he had some friends in Washington also who would like to have some property in Cuba for that purpose, as a result of which Phillips and I told him that we were negotiating the purchase of a piece of property in Pinar del Rio, which we would sell in whole or in part and as a final result we told him that we were going to be in Washington during the latter part of January, for the purpose of attending a Meeting of the stockholders of the Company of which I was Secretary and that we would take the matter up in detail with him then and see if he could sell it.

Q. When did he leave Cuba on that visit? A. As I remember he left in time to get to Washington for Xmas.

Q. When he left had the terms between you and Madam Ascosta for the $10,000.00 option been agreed to? A. I think they had practically been agreed upon but I do not think the option had been signed.

Q. Before Micou left did you make any agreement with him to give him an interest in the option? A. Nothing definite.

Q. Was anything said at all between you and Micou about
171 his having an interest in the option and if so what was it? A. There was nothing said about his having an interest in the option, but it was understood that he was to place this property for us or to assist us in doing it.

By Mr. DARLINGTON: I object to any testimony as to understandings, especially when nothing was said.

Motion to strike out.

Q. Did you tell Micou at that time what the property was to cost you? A. No.

Q. Did he ask you anything about it? A. No.

Q. If later you and Phillips went to Washington, tell what you did in regard to this property there? A. We arrived in Washington on the 25th of January, 1904, and soon thereafter we called on Mr. Micou and told him that we had secured an option on the piece of property known as Las Ovas, or rather a part of it, which was to cost us $10,000.00 but that including all expenses that might be incurred in connection with the matter that the cost price would probably go to $15,000.00 and that we would sell this property for $25,000.00 and that if he could place same that we would give his firm one-third interest. He told us that he had some people interested and as a result of which he introduced me to Colonel Reid.

I told him that we had this property for sale for $25,000.00.
172 We talked the matter over. General Reid said he thought that it would be good business to buy property in Cuba but that he did not live in Cuba and had no way to attend to property there, and suggested that if a Company were formed to purchase the property he would take stock in same. Then the question came up of possibilities of the formation of the Company; what the Company would do with the property, etc., etc., and Phillips suggested that a Company could be formed and that it would be a good business to plant oranges and sell planted groves on the installment plan; then he was asked to get up a prospectus giving his ideas in detail.

By Major RUNCIE: Mr. Phillips?

A. Yes sir. Then the question came up as to the management of this Company and the selling of the groves. General Reid said that it seemed to be a good business, but that the important question would be whether or not the groves could be sold and Phillips proposed that in case they wanted to form a Company for developing this property that for 40% of the stock in the Company he would be willing to undertake its management and that he would give a third of the 40% to Herbert & Micou for attending to the legal details incident to the business—a third of the 40% to me for looking after the interest of the Company in Cuba—and the
173 other third of the 40% for managing the Company and attempting the sale of the groves.

Q. I show you a paper attached to General Reid's testimony in Washington, marked "Complainant's Exhibit No. 1," and ask you what it is? A. That is the prospectus referred to which was drawn up by Phillips by request of Colonel Reid and also Micou, as I remember.

Q. I will ask you whether you told General Reid at that time what price you would pay the widow Acosta for the property? A. I did not.

Q. Did he ask you? A. No.

Q. After these negotiations did you enter into a contract in writing with General Reid—Herbert—Micou—and—Phillips, as the other parties to it? A. I did.

Q. I hand you Exhibit No. 2 to General Reid's testimony taken in Washington and ask you whether or not that is a copy of the contract in writing? A. This is a copy of the contract which was signed at that time, before I left Washington, with the exception that Herbert'- and Micou'- signatures were attached thereto—I notice that they have failed to sign this copy.

Q. Who drew this contract? A. Micou.

174 Q. I observe that it is not dated—what is your recollection as to the date when it was signed? A. Well it was some time in February, 1904.

Q. Was it signed before or after you left Washington? A. Before I left Washington.

Q. How long after that contract was signed before you left Washington? A. I left very shortly after that contract was signed and went to Richmond, Va., with Micou and Phillips, because Micou

had a friend in Richmond whom he thought would go into the purchase of the property.

Q. Did that friend go into the purchase of that property after you got to Richmond? A. He did not.

Q. While you were in Richmond did you enter into a written contract with Micou, acting for Herbert and Micou in regard to his participation in this deal? A. I did. Micou suggested as I was going on back to Cuba from Richmond and was not going to return to Washington, that as there was only a verbal understanding between us regarding the disposition of the profit that it would be better to have a written agreement. He drew up one himself which was signed by Charles T. Phillips, myself and Herbert & Micou by Benjamin Micou.

Q. I hand you a writing on the paper of the Jefferson Hotel, Richmond, Va., and ask you what it is?

175 "DAVIS EXHIBIT No. 1.

The Jefferson, Richmond, Virginia.

RICHMOND, —— —, 190–.

Whereas there is now under consideration the organization of a corporation to acquire, develop and dispose of land in Cuba for orange growing and other purposes and the parties to this agreement who purpose *bring* stockholders in said corporation have agreed or will agree with the other proposed stockholders of said corporation to acquire for and to deliver to the corporation when organized for $25,000 some 4000 acres of land part of what is known as the Las Ovas tract in Pinar del Rio Province, Cuba, and whereas Charles T. Phillips and Norman H. Davis have an option on this land for $15,000 it is hereby agreed between Charles T. Phillips and Norman H. Davis as parties of the first part and H. A. Herbert & Benj. Micou, under the firm name of Herbert & Micou, as parties of the second part that any sum in excess of $15000 paid for this land by the corporation or the subscribers to its capital stock shall be divided as follows—2/3 to be divided between the two parties of the first part and 1/3 to go to the parties of the second part. Should the parties to this contract take stock in the corporation instead of money for the whole or any part of the — except over $15000 to be paid by the corporation for this land then that such stock is likewise to be divided 2/3 between the parties of the first part and 1/3 to
176 the parties of the second part. Agreed upon this 5th day of February, 1904.

(Signed) NORMAN H. DAVIS,
CHAS. T. PHILLIPS,
HERBERT & MICOU,
By BENJ. MICOU."

A. This is the contract drawn up and written by Micou above referred to.

Q. And the signatures? A. And the signatures of myself, Chas. T. Phillips, Herbert & Micou by Benj. Micou.

Mr. PUTNAM: I offer this paper in evidence and ask that it be marked "Davis Exhibit No. 1."

Mr. DARLINGTON: We object to the paper on the ground that neither the Las Ovas Company nor General Reid, Dr. Sowers or Colonel Herbert its stockholders, other than the witness are parties to it or *to* have shown to have any knowledge of it. It is therefore *res inter alia actæ* for all purposes of this suit.

Q. After the signing of that contract where did you go? A. I returned to Cuba.

Q. Had you ever met Colonel Herbert or General Reid before that visit to Washington? A. I had not.

Q. Did you meet them then? A. I did when Micou introduced me in this matter.

Q. At that time had you ever seen the Las Ovas property? A.
177 I did not but I had made quite a lot of inquiries from people who knew of the property in that section and before leaving for Washington we sent Thomas Abbot down to examine the property with instructions to cable us to Washington if it were as represented.

Q. Did he cable you? A. He did.

Q. Have you a copy of the original, or the original of that cable? A. No.

Q. Do you know what has become of it? A. I do not.

Q. Do you know its contents? A. The substance of it was that the property was as represented.

Q. Up to the time that you left Washington on that visit had any other person became parties to that contract, which is "Exhibit No. 2" to General Reid's deposition, other than you, Phillips, Reid, Herbert and Micou? A. No.

Q. Was it agreed between the parties I have named before you left Washington that Micou should go to Cuba and examine the property? A. It was suggested, though Phillips and I did not suggest any one as this was left to General Reid and Herbert.

Q. When did you next see General Reid and Micou? A. In Havana some time about the middle of March, 1904.

178 Q. You have seen in the bill the reference to Billings as a party to this contract; explain what you know as to that? A. When I was in Washington, Micou also introduced us to Captain Billings and he was considering going into this deal.

Q. Did he agree to go into this deal when you left Washington? A. He had not signed the contract and had not agreed definitely.

Q. If you did anything in regard to the property before General Reid and Micou in March, 1904, got here, state what it was? A. We sent John Bullard down to make an expert examination of this property because we had heard that the property North of the railroad, which Tarafa had refused to sell to us before we went to Washington on the ground that he had given an option on that

part of the property, wa a great deal better than the other portion which we had an option on.

Q. Had Bullard reported to you before General Reid and Micou got to Havana? A. Yes he reported that the northern portion was very much more valuable than the other part.

Q. After General Reid and Micou got here, if there were any further negotiations between the parties to the contract signed in Washington, state what they were. A. Soon after their arri-
179 val in Havana we decided to go to see the property, but the day before visiting the property General Reid, Mr. Micou and I drove out to a large orange plantation not far from Havana, which is owned by Adam Gray. We got out and looked over this orange grove and General Reid struck up an acquaintance with a Mr. Howard who was working on this plantation and it developed that they were from the same part of the United States and General Reid asked Howard to go with us the next day to visit this property as he wanted his opinion on the same. Phillips had asked a Mr. Towns, who is a nurseryman to go down with the party to see the property also.

Q. Had you ever known this man Howard before you met him at the Adam Gray plantation with General Reid? A. No I had never seen him before.

Q. Well what did you do then? A. The next morning General Reid, Micou, Towns and I took the train to see the property and Howard boarded the train at some station a piece out from Havana and accompanied us on the visit to the property.

Q. Had Phillips ever met Howard prior to that time? A. No.

Q. Who paid Howard's expenses on that trip? A. General Reid.

Q. Well after Howard joined you on the train what did
180 you do? A. We arrived at the station at Las Ovas about eleven o'clock, had breakfast and then took horses and rode over the property all afternoon, arriving in Pinar del Rio that night where we spent the night. The next afternoon we returned to Havana.

Q. What did you do after you got back to Havana? A. Coming back on the train General Reid told me that the property was better than he expected: that he did not care what Phillips and I made out of the deal but that he was not willing for Herbert and Micou to have any promoters' stock unless he should have an equal amount as he was putting up all of the money. That night we met in General Reid's room at the Villa Hermosa to discuss the matter. In the mean time we had decided that it would be better to include the property north of the railroad and also to include the property between the blue line and the red line on the sketch presented by Tarafa and marked "Exhibit "A" Tarafa," because we had decided that Tarafa was leaving out the best property.

Q. When you say we decided, whom do you mean? A. General Reid, Micou and myself, as well as Howard and Towns, who had the same opinion; however, I will state that we had practically agreed on that before we went to the property this time.

181 Q. When you made this visit did you have any option on the property north of the railroad or on the property between the blue line and red line? A. Before we went to see the property we had a talk with Tarafa and he said that the option on the northern portion of the property had expired and that he would give us a new one and it was then he drew up the letter of March 16th, 1904, addressed to Phillips and myself, offering the entire tract of land owned by his Mother for $25,000.00 or all of the property above the red line on the above mentioned sketch for $16,500.00, or all of the property North of the blue line for $19,000.00. After visiting the property and talking with some natives I came to the conclusion that the property between the blue line and the red line was very valuable, especially the piece of property known as Cayo Robla and for my part I did not consider for a moment the $16,500.00 proposition. On this visit to the property it was the concensos of opinion of everyone that we should also get the property including the Lake in case it should ever be necessary to irrigate.

Q. Now you can tell what happened at the Vil-a Hermosa? A. In view of the conversation and attitude of General Reid regarding Herbert and Micou receiving promoters' stock we talked this matter over and General Reid said that he would not go into the

182 deal unless he should have an amount of promoters' stock equal to what Herbert and Micou should have. Then we agreed to purchase the additional property north of the railroad and the property between the blue and red line- referred to which was to cost $9,000.00 and which would make a total purchase price to the Company of $34,000.00 and to draw up a new contract embodying these conditions and also changing the disposition of the promoters' stock.

Q. Was such a contract drawn up and by whom? A. The contract was then drawn up the next day by Micou.

Q. I hand you a paper headed, "memorandum of agreement" and ask you what it is? A. This is the contract to which I have just referred which was signed the following day.

Q. Did you see the parties sign their names to it? A. I did.

Q. On the back of that contract there is a pencil memorandum; do you know who put it there and what it means? A. I do not know who put it there.

Mr. PUTNAM: I offer this paper in evidence and ask that it be marked "Davis Exhibit No. 2."

"DAVIS EXHIBIT NO. 2.

This memorandum of agreement by and between the parties signing the same, witnesseth:

183 That Charles T. Phillips and Norman H. Davis, of Havana, Cuba, and Colonel Geo. G. Reid, Hilary Herbert and Benjamin Micou, of Washington, D. C., under the firm name of Herbert & Micou, agree to purchase a tract of land in Cuba containing five thousand acres of land more or less, said portion being in the north-

ern part of the estate known as "Las Ovas" which estate is the property of the Widow Tarafa.

The said five thousand acres subject to this agreement are situated in the Province of Pinar del Rio.

That Messrs. Reid, Phillips, Davis, Herbert & Micou will acquire this tract of land for the formation of a Company to be organized for the sum of $34,000.00 which sum is to be paid, half in cash on delivery of the deed, and the other half paid in twelve months, and 40% of the stock of the Company to be formed.

The Company is to have a capital stock of $150,000.00 40% of which or $60,000 worth of stock to be divided equally between signers of this contract. Colonel Reid will have $15,000.00 of this stock; Messrs. Herbert & Micou will have $15,000.00 of this stock; Mr. Davis will have $15,000.00 of this stock and Charles T. Phillips will also have $15,000.00 of this stock. The remainder of the $150,000.00 worth of stock to be subscribed for by the people signing this agreement in proportion to the amount of shares subscribed each one agreeing to pay sufficient money to pay for half of the land now, and the balance at the maturity of the mortgage, pro-
184 vided, that there shall be an Expense Fund of $5,000.00 and each share shall pay its proportionate part as necessary and as is called for by a majority of the stock.

Charles T. Phillips hereby subscribes for 22 shares stock.

Colonel Reid subscribes for 35 shares of stock.

Mr. Micou subscribes for 17 shares of stock.

Mr. Davis for 10 shares of stock.

Captain Billings has six shares of stock which if not paid for, will be taken by the parties subscribing in proportion to their stock.

For the purpose of facilitating business and until the formation of the Company, it is agreed by all parties that the property is to be placed under the name of Mr. Benjamin Micou who will deed it to the Company as soon as same is formed, and Mr. Micou hereby acknowledges receipt of the checks of the different promoters for the stock that they have subscribed to.

Havana, Cuba, March 19th, 1904.

(Signed) CHAS. T. PHILLIPS,
NORMAN H. DAVIS,
GEO. C. REID,
HERBERT & MICOU,
By: BENJ. MICOU.

endorsed on back—2nd Agreement."

Q. State whether or not any portion of the land provided to be purchased by this contract, Exhibit No. 2, was included in your first option from Madam Acosta? A. Yes the part of the
185 property by the first option which was supposed to contain 4,000 acres, more or less was included in this second agreement.

Q. Describe it on the Tarafa pencil plat. A. Well it was the portion of the property south of the railroad, extending to the red line. The railroad is not shown on this plan or sketch but crosses the northern portion of the property.

Q. What additional land is included in this contract? A. The land north of the railroad and the land included between the red line and the blue line.

Q. How much additional to your first option was to be paid to Madam Acosta for this additional land? A. $9,000.00.

Q. After the signing of this contract, your Exhibit No. 2, what further was done between you and Phillips, Micou and General Reid? A. Mendoza was then instructed to complete his examination of the titles as soon as possible. In the meantime we had practically agreed to add the property including the lake which according to the sketch by Tarafa was included between the blue line and the line marked "E. D." for the sum of $3,000.00; however, before we had definitely decided upon this Mendoza found reference or discovered the fact that there were some censos on the property which we did not know about excluding the censos
186 of about $1,300 on Cayo Robla. These censos amounted to $5,400 as I was informed which Tarafa claimed that they had never recognized and which he did not know about before; however, in case that these censos of $5,400 might possibly become a charge on the property Tarafa agreed to put the Lake addition in for $1,000.00 extra instead of $3,000.00. In this Lake addition there was a small tract of land known as Cayo Junco which had a censos of $900.00. This was agreed upon and the Lake addition was included in the purchase.

Q. Was that agreement to include in the purchase made before or after the signing of this agreement which is your Exhibit No. 2? A. Afterwards.

Q. Who agreed to include that Lake addition? A. Micou, Phillips and myself.

Q. Was General Reid a party to that agreement? A. I think not.

Q. Where was General Reid at that time—at the time the agreement was made? A. He had gone to Guantanamo.

Q. Do you know Mr. Mendoza? A. I do.

Q. Do you know what his professional and personal standing is in Havana? A. Yes sir.

Q. What is it? A. Of the best.

187 By Mr. DARLINGTON: We object to the question as being incompetent, irrelevant and immaterial.

Q. Did you introduce any of the parties to this agreement, Micou, General Reid or Phillips to Mr. Mendoza? A. Phillips first carried Micou and General Reid, as I remember to talk to Mr. Mendoza about the examination of the title, but I was present with Micou when Mr. Mendoza gave him his verbal report regarding the titles before the signing of the deed.

Q. State what that verbal report was, especially in reference to the censos on the property? A. He explained to us both fully the censos which I have mentioned above.

Q. Where was General Reid then? A. I think he was in Guantanamo at that time.

Q. Did you ever speak to General Reid about those censos after his return from Guantanamo? A. I did.

Q. What did you tell him? A. I told him all about it to the best of my knowledge at that time, although I probably was not as conversant with its detail as I have since become.

Q. State whether or not you told him about the censos aggregating $5,400.00? A. I did.

By Mr. DARLINGTON: Objected to as leading.

Q. If a deed was finally signed consummating these
188 negotiations tell what it was and when it was? A. On March 25th, 1904, Madam Acosta deeded the property now held by the Las Ovas Company to G. E. S. Escalante for the purchase price of $20,000.00 and on the same date Escalante deeded this property to Benjamin Micou for the purchase price of $35,000.00.

Q. Who is Escalante? A. At that time Escalante was working for Mr. Phillips and myself.

Q. Did General Reid ever learn of the addition for $1,000.00 which you call the Lake addition? A. Yes I told him about it on his return from Guantanamo; I told him that we had assumed the responsibility of including this in the purchase and that if the Company did not want it that I myself would take it.

Q. What did you tell him of the manner in which the price for that addition was arrived at? A. In explaining the censos at $5,400.00 I explained why the Lake was taken in and secured at such a low price.

Q. What did he say in response to your proposition to take it yourself if he did not agree for the Company to take it? A. He said that he thought the Company should take it or at least have the refusal of same.

Q. Well state whether or not it was finally taken?
189 A. It was finally taken.

Q. When was the first time you were in company with General Reid and Mendoza? A. I do not remember definitely but think it was either just before his leaving for Guantanamo or on his return from Guantanamo.

Q. How long did Micou stay in Havana after the execution of the deeds to which you have referred? A. He left the next morning.

Q. Did General Reid return from Guantanamo before he left? A. No I think not.

Q. How long did General Reid remain in Havana after his return from Guantanamo? A. A very short time.

Q. What was the amount of money paid to Mrs. Acosta on the first payment? A. $5,000.00.

Q. How much of that money did General Reid contribute? A. He contributed $6,611.00.

Q. More than the first payment? A. Yes sir.

Q. What was done with the difference between General Reid's payment and the amount paid to Mrs. Acosta? A. It was taken by

Phillips and myself for covering certain expenses that we had been to in connection with the sale.

190 Q. When did you next go to Washington? A. Some time in May, 1904.

Q. State whether or not Phillips went to Washington at that time? A. He did not.

Q. What was done with reference to this property after you went to Washington in May? A. We then agreed definitely on the formation of a Company and Mr. Micou drew up the application for a Charter.

Q. Under what jurisdiction was the Corporation organized? A. The State of Virginia.

Q. How long did you stay in Washington on that visit? A. Four or five days; not over that.

Q. Do you remember what date of the month you left there? A. I have a letter here some where which shows that, but I think——

Q. On examining Exhibit "A" to Dr. Sowers deposition taken in Washington, can you fix the date when you left Washington? A. It was either the 14th or 15th of May.

Q. Do you remember the day of the week? A. I left on Saturday.

Q. What was done while you was in Washington toward the formation of the Company I mean securing the Charter? A. Dr. Sowers, General Reid, Herbert and Micou and I met in the

191 office of Herbert & Micou either on the 13th or 14th of May and signed the application for the Charter.

Q. What was done about Phillips signature to the Charter? A. Nothing.

Q. Was the Charter to the Company secured while you were there? A. No I think not.

Q. Did you make any representation while there to General Reid or to any other person that the widow Tarafa had received $25,000.00 for the property? A. No.

Q. Did you make any representation to General Reid or to any other person as to what price Madam Tarafa had received for the property? A. I did not.

Q. Have you ever told General Reid or Dr. Sowers what Madam Acosta received for the property? A. No.

Q. I observe in the contract marked "Davis Exhibit No. 2," that there is reference to six shares of stock to Captain Billings; please explain Billings connection with the project?

By Mr. DARLINGTON: I object to any attempt to have the witness contradict this written contract by his oral testimony at this time.

A. General Reid and Micou told me when they came to

192 Havana that Billings had said he would like six shares of stock but that it was not certain that he would take them and furthermore General Reid said that he would prefer not to have Billings in the deal.

Q. State whether or not Billings did take and pay for the six shares of stock? A. He did not.

Q. What became of those six shares of stock? A. I subscribed

or rather took the shares which had been reserved for Billings with the understanding that if we did not sell them they would be divided between General Reid, Herbert & Micou, Phillips and myself in proportion to our respective holdings. When I went to Washington in May I arrived there with a very bad cold and almost had pneumonia and asked Micou to recommend a good Doctor. He recommended Dr. Sowers and at the time stated that he thought I could sell the six shares of stock left to Dr. Sowers. He telephoned Dr. Sowers that I would be over there and after Dr. Sowers had examined me he asked me about Cuba and in the conversation this matter was mentioned and as I remember he told me that Micou had spoken to him about it. He said that he would like to get in on the deal. I then explained about the six shares of stock and he told me that he would like to take them and told me to come back to see him the next day. I went to see him the next day. We talked
193 the matter over thoroughly. I told him that he could have the stock but that I would have to charge him a profit on the same as I considered the stock was worth more than it had cost and as he said that that would be all right I told him what he could have the stock for. I did not tell him what it had cost me and he gave me a check.

Q. I show you a check marked "Exhibit "A" Dr. Sowers," and attached to his deposition and ask you if that is the check he gave you? A. It is.

Q. How much did you charge him for the stock in excess of what it had cost you? A. I do not know.

Q. Did you know what it had cost you? A. I do not.

Q. What did you do with that excess? A. I told General Reid and Micou that I had sold Dr. Sowers this stock for something more than the subscription price of the same, which of course was to be divided between all of us. They told me as I had been to some expense to Washington on this trip that I could take this profit for the payment of my expenses.

Q. When was it that you told them about this profit? A. On the day of receiving the check.

Q. Did Micou go with you on either of those visits to Dr.
194 Sowers? A. I think not. As I remember he telephoned Dr. Sowers that I would be there, but I am certain that he was not present when I talked this matter over with Dr. Sowers about the stock.

Q. How long after you received that check was it before you were in company with General Reid and Dr. Sowers? A. It was between the date of that check and the following Saturday on which I left Washington which must have been either the 14th or 15th.

Q. What was the occasion of your being with them? A. I was with them that is Reid and Micou most of my time while in Washington, but as I have above stated we all met at that time for signing the application for the Charter of the Company.

Q. Who drew your answer to the Bill in this case? A. My counsel, Mr. Samuel A. Putnam.

Q. Where were you when the Bill was drawn? A. In Havana.

Q. Where was I? A. In Washington.

Q. The answer states that Micou or General Reid had gotten Dr. Sowers in this proposition; if you signed the answer with that statement in it, state what else you did? ?

By Mr. DARLINGTON: I object to any oral testimony of the contents of any letter.

A. I wrote to you when I returned the answer stating that I was not sure that General Reid had participated in this and to please to strike it out of the answer.

195 Q. When you sold the Billings shares to Dr. Sowers, had the Company issued the certificates for them? A. They had not.

Q. In what manner did you provide for their delivery to Dr. Sowers? A. Before leaving Washington in May I gave a Power-of-Attorney to Micou to transfer the stock to Dr. Sowers when it was issued.

Q. After this visit in May were you in Washington any more before the organization of the Company? A. No.

Q. What part in the management of the property did you take after your return to Cuba? A. I superintended or rather aided the survey of the property and afterwards went to Las Ovas to make contract for rent and also to carry or attend prospective buyers.

Q. How long was it before General Reid came to Cuba after your visit to Washington in May? A. I think it was the 1st part of January, 1905.

Q. What did he do while he was here? A. He and I went to the property and talked the business of the Company over in general and we also consulted with Mr. Mendoza several times.

Q. You have heard Mr. Norton testify to a visit he made to the Las Ovas property; what do you know about that? A. I remember that he and General Reid and I visited the property together.

196 Q. Do you remember when that was? A. I think it was not later than January, 1905; I don't remember definitely; I know as I stated that we did visit the property together because we had been negotiating for some time with the Norton Bros., Company, relative to the making of a contract for planting oranges on the property and Norton wanted to examine the property thoroughly.

Q. When was the next time General Reid was there? A. That was in March, 1905.

Q. State what you know about the payment of a deferred portion of the purchase price of the Las Ovas property? A. This payment was made on the 25th of March, 1905, and Major Runcie signed the deed cancelling the mortgage for $15,000.00 which had been made in favor of Mrs. Acosta and also the mortgage of $2500.00 held by Escalante.

Q. For whom did Escalante hold that mortgage for $2500.00? A. At that time it was held for me.

Q. Did Phillips or Herbert & Micou have any interest in it? A. I had bought their interest in this mortgage.

Q. For whose interest was it originally held? A. Herbert & Micou, Phillips and myself.

Q. You say you had bought Herbert & Micou and Phillips
197 interest; explain that transaction fully? A. I was in Washington in January, 1905, having returned with General Reid. I bought part of the stock of Micou and part of the stock of Phillips and this was taken into consideration in the trade that I made with them.

By Mr. DARLINGTON: I object to the latter part of the question as being altogether too vague and indefinite to be evidence in a Court of Justice.

Q. Can you make that answer more definite? A. I do not remember the exact amount that I gave Phillips and Micou.

Q. Did you give them any money? A. I did.

Q. How was the money contributed to pay the debts secured by the mortgage to Mrs. Acosta and the mortgage to Escalante? A. It is the last payment.

Q. The last payment? A. I gave General Reid $4650.00 for my portion of same.

Q. I hand you a paper purporting to be a receipt signed by George C. Reid and ask you what it is? A. That is the receipt for the $4650.00 that I paid him as Secretary and Treasurer.

Mr. PUTNAM: I offer this paper in evidence and ask that it be marked "Davis Exhibit No. 3."

HABANA, *March* 29, 1905.

Received of Norman H. Davis the sum of Four Thousand six hundred and fifty dollars ($4650.00) in full for his assess-
198 ment on 24 ...ares of assessable stock in The Las Ovas Co., Inc., this being his pro rata share of the payment of $17500.00 principal and $437.50 interest on the cancellation of the mortgage on the "Las Ovas" property.

(Signed) GEO. C. REID,
Secretary and Treasury.

Q. If you know how the other money was contributed state it? A. I do not know.

Q. Did you have an interview with General Reid during his visit to Havana in March in regard to the price paid to Mrs. Acosta for the land. A. I do not remember.

Q. General Reid has testified that Major Runcie made a translation of deeds to him in your presence during his visit to Havana in March, 1905; what do you know about that? A. It is a fact.

Q. He states further that previously on his return from Guantanamo you had told him that as Madam Acosta had given an interest of some description in the property to her Daughters and according to the Laws of Cuba these daughters could not transfer back to their mother said interest and it became necessary for them to make a deed of their interest to some outside party and for this reason their

interest has been deeded to Escalante; did you ever make
199 those statements to General Reid? A. I certainly did not.

Q. What did you say to General Reid in regard to that at the time Major Runcie translated the deeds to General Reid in your presence? A. I do not remember.

Q. Did Major Runcie or General Reid make any reference to the fact that the deed of Madam Acosta to Escalante showed a purchase price of $20,000.00? A. Yes.

Q. What was it? A. Well something was said about it and General Reid asked why that was or something of the kind and Major Runcie said that that had nothing to do with the matter in hand; that hindsight was a good thing but that foresight was better and that was a matter to have looked into at the time of purchasing the property.

Q. Did you say anything yourself about it and if so what was it? A. I think that I did say that Mr. Mendosa had advised deeding this property to a third party.

Q. Did General Reid make any remarks other than you have stated and what they were they? A. I do not remember any other remarks.

Q. What were your relations with General Reid from the inception of this Las Ovas enterprise up to bringing this suit? A. Very friendly.

Q. Was any complaint ever made by him to you of your
200 conduct in regard to the matter? A. I believe he did complain about things being done in Cuba very slowly and about our deed not having been registered and I explained that I had repeatedly requested that the Company pay the transfer tax on the deed in order to get it registered.

Q. Was this the only cause of complaint that you heard of? A. We had a few misunderstandings after he got control of the Company; that is the controlling interest in the Company and one of them was in reference to the rent contract.

Q. I hand you a letter purporting to have been written by General Reid, dated July 15th, 1904, and ask you if you recognize the signature and how it came into your possession? A. That is the letter written to me by General Reid.

Q. When did you receive it? A. Well in July, 1904.

Mr. PUTNAM: I offer this letter in evidence and ask that it be marked "Davis Exhibit No. 4."

By Mr. DARLINGTON: As this is rather a long letter please state for what purpose offered?

Q. Also this one. A. The top or date of this letter is torn off; I do not know why, but it was written in 1904 and I think in the month of October, which I ascertain by a copy of a letter which I wrote in reply.

Q. I hand you a letter dated, November 2nd, 1904, and
201 ask you what it is? A. Well this letter was written to me by General Reid.

Q. I hand you one dated, December 22nd, 1904, and ask you what it is? A. That is also written by General Reid to me.

Q. I hand you one dated, February 8th, 1905, and ask you what it is? A. That was also written by General Reid to me.

Q. I hand you one dated, April 5th, 1905, and ask you what that is? A. That was also written by General Reid to me.

Q. I hand you one dated, June 17th, 1905, and ask you what it is? A. This was also written by General Reid to me.

Mr. PUTNAM: I offer all of these letters in evidence and ask that they be attached together and marked "Davis Exhibit No. 4."

By Mr. DARLINGTON: As this exhibit is quite voluminous will the Counsel please state what portions of them he relies upon—for what purposes he introduces them?

Mr. PUTNAM: They are introduced for the purpose of showing the relationship between General Reid and Davis from the inception of the Las Ovas enterprise up to the bringing of the suit and for the further purpose of showing General Reid's knowledge of the various transactions in regard to the property.

Mr. DARLINGTON: What various transactions?

Mr. PUTNAM: The censos for one. In a general way pencil marks have been placed opposite to the portions relied upon. I am not sure that that has been done to all nor am I willing to
202 confine myself to the portions thus marked with a pencil.

Mr. DARLINGTON: I object to the introduction of these letters for any other purpose than those stated and I object to any portions except the pencil ones unless said further portions are called to the attention of the Counsel before the examination of this witness is concluded.

Mr. PUTNAM: I agree to suspend taking of this deposition until Counsel for the Complainant shall have such time as he requires to examine the Exhibit.

Mr. DARLINGTON: Does the Counsel make that proposition in good faith in view of the circumstances and conditions which we made here this afternoon, namely; that we would take the examination of this witness stenographically so that I may take the return boat for the United States which leaves tomorrow at eleven a. m.

Mr. PUTNAM: I will try and call your attention to any portions that are not marked before the examination of the witness is concluded.

Mr. DARLINGTON: Very well.

Q. How is the stock of the Las Ovas Company now held? A. General Reid has 74 shares—Cane one share—Conrad Reid one share—Dr. Sowers 6 shares—Colonel Herbert 9 shares and I have 49 shares and there are 10 shares in the Treasury of the Company.

203 Q. How did you acquire 49 shares? A. I secured 15 shares of the 40% of stock which was divided between Herbert & Micou, Phillips, General Reid and myself and 10 shares by subscription and I purchased from Phillips 13 shares and 11 shares by purchase from Micou.

Q. Have you made any purchase from Phillips since your answer was filed? A. At the time I refer to some while ago when I purchased stock from Micou and Phillips in Washington, I took this stock from Phillips in settlement of some personal accounts and subsequently on another settlement I owed Phillips some money and he took the seven shares in lieu thereof, but I have since repurchased the seven shares from Phillips.

Q. Was that before or after the filing of your answer? A. After.

Q. Were any of those last two transactions shown by transfer of the stock in the books of the Company? A. No.

Q. General Reid says that you suggested to him to give one share each to Cane and Conrad Reid to qualify them as Directors; is that true? A. I did not advise him but I was there and I offered no objection. I thought it was all right.

Q. Was the stock that you purchased from Micou paid up stock or a portion of the 90 shares which was assessment stock?

A. Three shares were paid up stock and eight shares
204 were assessment stock.

Q. What became of the Herbert and Micou portion of the paid up stock? A. Micou transferred 9 shares of paid up stock to Colonel Herbert.

Q. Was that all of the Herbert & Micou paid up stock? A. General Reid bought 3 shares of paid up stock from Micou and 7 shares of the assessment stock.

Q. Is the stock now held by Herbert a part of the paid up stock referred to in the agreement as promoters stock? A. It is.

Q. What did you and Phillips do with reference to carrying out the agreement with Herbert and Micou marked "Davis Exhibit No. 1?" A. Phillips and Micou, Micou representing Herbert & Micou and I had several settlements and the division of the profits provided for in that agreement were made—Herbert and Micou receiving their third.

By Mr. DARLINGTON: I object and will move to strike out on the ground that the witness has favored us with no facts relating to the question but simply formed his own conclusion that the agreement in question was carried out.

Q. Can you give the details of the settlement between you and Micou? A. Micou, for Herbert and Micou subscribed for 17
205 shares of assessment stock, the majority of which he took as his part of the profits and only paid about $1,200.00; I do not remember exactly the amount, but that is close to it.

By Mr. DARLINGTON: I renew my objection and move to strike out on the ground that the answer is irresponsive to the question.

Q. When the profits were realized on the sale to the Company how was it taken? A. All with the exception of $2800.00 in cash was taken in stock.

Q. What was the $2800.00? A. General Reid paid $1600.00 (and some odd dollars) above the actual amount paid to Mr. Acosta at the signing of the deed and Micou paid about $1200.00 to cover the expenses that had been incurred in the sale of the property.

Q. Did you ever offer the land included in the first option given you in January for any less sum than $25,000.00 to any one? A. No.

By Mr. DARLINGTON: Objected to as being irrelevant and immaterial to any issue in this case.

Q. What experience have you had in real-estate in Cuba—I mean as to the extent of it? A. Well for nearly four years I have been loaning money on mortgages on country and city property throughout the Island of Cuba.

Q. Are you familiar with the values of such property as the Las Ovas property? A. I am.

206 Q. Are you familiar enough to be able to say what that property was worth in March, 1904? A. I am.

Q. How much do you consider the property worth at that time? A. I considered that that property at that time was worth at least $40,000.00 and that Mrs. Tarafa had no idea of its value.

Q. What do you consider that property worth now? A. I think it is easily worth $60,000.00.

Q. Where is Escalante? A. I do not know—I have not seen him for nearly a year.

Q. Did you ever tell General Reid or any other person that the widow Tarafa was in straitened circumstances and obliged to sell her land at a sacrifice? A. I certainly did not.

207 Cross-examination by Mr. DARLINGTON:

Q. Mr. Davis where was the Colonial Loan and Deposit Company incorporated? A. In the State of Virginia.

Q. At what point in Virginia? A. At Alexandria.

Q. Who were the incorporators? A. I do not remember.

Q. You and Phillips? A. The Company was incorporated two or three years before I ever was connected with it in any way whatever.

Q. Who were the controlling parties in interest in March, 1904? A. It was a cooperative Company—mutual company.

Q. Cannot you tell us who the parties were in control at that time? A. Well the Directors were Phillips and myself, J. A. G. Lanuza, Manuel Otaduy and M. M. Miller.

Q. You answer slowly; have you difficulty in remembering all the parties besides yourself and Phill[illegible] The Board changed several times and I was trying to recal[illegible]n to answer correctly.

Q. What became of the Company? A. The Company was purchased by The Trust Company of Cuba.

Q. Who are the controlling parties in interest in that Company? A. No one individual or company. I can tell you the prin-

208 cipal stockholders. The Royal Bank of Canada, the Bank of Nova Scotia, N. Gelats, a Spanish Banker, A. H. Livesey, Manager of the Western Railway of Havana, Frank Day of the firm of R. L. Day & Co., of Boston, Mass., J. A. G. Lanuza, myself, O. A. Hornsby, Manuel Otaduy, G. F. Greenwood, Manager of the Havana Electric Railway Co., and various others, I cannot give you the list.

Q. How many others? A. About 500 more or less—or several hundred.

Q. Was Phillips a stockholder? A. No sir.

Q. When was it organized? A. In July, 1905.

Q. Where was its place of business? A. In Havana, Cuba.

Q. Has it not a more definite address than that? A. Cuba Street No. 31.

Q. Who is in charge there? A. I am Vice-President and General Manager.

Q. Do you mean by that that you are the officer in charge? A. Mr. O. H. Hornsby is the Secretary and Treasurer.

Q. Where is his place of business? A. In the office of the Company. Mr. Hornsby is Secretary and Treasurer and was up until the 1st of January, one of the Managers of the Royal Bank of Canada in Havana.

209 Q. Where was the Huston Contracting Company organized? A. In Havana.

Q. Where was the Columbia Company to which you refer incorporated? A. In Havana.

Q. You testified that in the latter part of 1903, you and Phillips decided to buy some land—is that correct? A. Yes sir.

Q. Did you buy any? A. We took an option on the Las Ovas tract of land to which I referred to in my testimony for the purpose of buying the same.

Q. I repeat my question—Did you buy any? A. No except as above stated.

Q. Was that the way you and Phillips decided to buy land in the latter part of 1903? A. No this was not as we originally intended to do.

Q. Why not? A. Because of the circumstances which I have explained today regarding the commencement of negotiations for the sale of this land through Micou and its subsequent termination.

Q. Why didn't you and Phillips buy land if you decided to do so as you stated? A. One reason was that this tract contained more land than we had intended to buy and Tarafa did not care to sell the smaller tract.

Q. Why then did you take the option? A. With the idea
210 of selling part of it.

Q. Why didn't you do that? A. We sold it all instead of part.

Q. You lost your desire to buy some yourselves then did you? A. No we did not but we had sufficient confidence in the value of that property to take our profit in same.

Q. In other words you changed your plan and concluded to buy in connection with other parties—is that correct? A. No I have explained the way it came about.

Q. Did you or did you not conclude instead of buying land yourself you and Phillips did purchase in connection with other parties? A. It is hard to answer that question yes or no.

Q. Why? A. Because I explained in my direct examination how

this came about, however I will further state that we were willing to sell this property for $25,000.00 and not one cent less.

By Mr. DARLINGTON: His answer is objected to and motion to strike out as in no sense responsive to the question.

Q. Did you and Phillips agree to buy land in connection with other parties or not? A. As it finally resulted we did; we sold this land to other parties and took our profit in the stock of the Company which was for the purpose of purchasing the same.

211 Q. Did you ever own it, you and Phillips? A. Only by option, I do not know whether in law you would call it so.

Q. Had not your option expired before any sale of the land was made? A. No it was renewed before its expiration.

Q. Did you not testify that Tarafa told you that your option had expired and that he then gave you a different option? A. I did not. What I did testify was that the option on the property north of the railroad expired and we then took an option on that.

Q. Whom did you ever tell that you were selling this land—that you and Phillips I mean. A. Why I told Micou and General Reid that we had the land for sale.

Q. Did you not tell them that you had an option on it? A. Yes sir.

Q. Did you tell General Reid that you were the sellers of the land? A. I do not know.

Q. Did you ever tell Herbert that you were the sellers of the land? A. I do not remember but I told Micou that we had an option on the land and gave him an interest in same.

Q. That you had an option to do what? A. That we had an option on the land.

212 Q. An option to what? A. To purchase the land.

Q. Is that what you told him? A. I do not know that I told him in those words.

Q. Is that the substance that you told him? A. The substance of which I told him was that we had an option on this land which we would sell and which we were offering to sell.

Q. Did you tell anybody else that besides Micou? A. I think I told General Reid so.

Q. When, where and in whose presence? A. In Washington during the negotiations regarding the sale of same.

Q. What did you tell him that you would sell the option for? A. I did not offer to sell the option at all; I offered to sell the land which I held under the option together with Phillips.

Q. Did General Reid agree to buy the land from you and Phillips or through you and Phillips; cannot you answer that question? A. I do not see how to answer that unless I go into details and tell what was done.

Q. Mr. Davis we are entitled to frank and direct answers and it will serve no good purpose to evade same and it will save both your time and mine to give them to us; I have asked you no question tonight that could not be answered in a few words and direct ones.

Mr. PUTNAM: I object to the statement of the Counsel that
213 it will serve no good purpose for Mr. Davis to refuse to answer frankly any question which has been asked him and especially to his statement that I have asked no question which could not be answered directly; I further instruct the witness to answer every question asked him as frankly and directly as he can.

By Mr. DARLINGTON: Then we agree.

By Mr. DAVIS: I am answering these questions as frankly and as directly as I know how because I do not see how the questions asked me could be answered in any other way.

By Mr. DARLINGTON: I will ask you to attend to the questions in the further cross-examination and see if you cannot answer them direct. I will make them as plain as I can. You testified in your direct examination that at your first meeting with Micou at Havana you said you would take the matter up with him and see if he could sell this land,—was that correct?

A. Yes sir. That is Phillips and I both agreed with him.

Q. You further state that you reached an understanding that he was to place the property for you and Phillips or to help you do so,—was that correct? A. Yes sir.

Q. You said nothing about his selling part of it and letting you and Phillips keep the rest of it? A. I do not remember that, but I think not.

Q. When your answer was made in Washington you say
214 you did tell him that you had an option for $10,000?
A. Yes sir.

Q. And that their was costs that might increase it to $15,000.00? A. Yes sir.

Q. What possible costs had you in mind to that extent? *Q.* Well our expenses to Washington and commissions and the cost of our floating the deal some other way in case it were not closed up there in Washington.

Q. What was the object of your visit to Washington at that time? A. To attend a meeting of the stockholders of the Colonial Loan and Deposit Company.

Q. What commission had you undertaken to pay in connection with this $10,000.00 option? A. The property was brought to us by a Roma Guera, a broker and we had not then agreed upon what his commission should be and I think that $5,000.00 was very excessive; I do not remember exactly why it was placed at that figure.

Q. Now Mr. Davis I want to suggest to you that you are departing from directness in answering the questions; my question was, what commissions you and Phillips had undertaken to pay on this $10,000.00 sale. A. I explained that by saying that it had not been agreed upon just how much would be paid to Roma Guera.

215 Q. Had you agreed to pay any? A. Yes sir, we told him that we would pay him a good commission to find us a good piece of land.

Q. When did you and he make any contract as to commissions? A. After I returned from Washington.

Q. And what was the contract? A. $600.00.

Q. At what rate was that? A. No special rate, just a lump sum.

Q. That was the commission on what sale? A. On the securing the property for us.

Q. In other words that was the commission to be paid for the sale by Madam Acosta? A. I will say that I think it was a mistake that the Company was charged with that commission.

Q. Who charged the Company with it? A. I do not remember, but I think it was Phillips.

Q. Did you not yourself notify the Company that that was the charge to be paid by them? A. I do not remember.

Q. Is that as definite an answer as you can give us on that subject? A. Yes sir.

Q. When did you have Mendoza examine the title? A. As I remember the titles were sent to Mendoza in December or the first part of January.

Q. What was his bill? A. $400.00.

216 Q. What was that for? A. For examining the titles and superintending the drawing of the deeds.

Q. For whom was that service rendered? A. He was supposed to be employed by Phillips and myself to examine the titles and Micou said that he was willing to take Mendoza's report on that for the Company and it was there then agreed that the Company was—wait a minute—to pay his fee.

Q. Who agreed to that? A. Phillips, Micou and myself.

Q. That is you and Phillips agreed that the Company should pay a bill that you had incurred and relieve you of its payment? A. I suppose that was the substance of it.

Q. Your dealings with this case, as I gather it were that you and Phillips practically bought this property from Madam Acosta and then sold it to the Company—do I understand your position correctly? A. No we had not bought the property.

Q. You never bought it? A. No.

Q. Was it ever deeded to you and Phillips? A. It was deeded to Escalante for us as our representative and for Herbert & Micou.

Q. Why was it not deeded to you and Phillips if you were the purchasers? A. I do not know.

Q. I wish that you would think a minute and give us a
217 little light on that subject if you can? A. We first considered having it deeded to us, but later decided to have it deeded to Escalante and it was probably because we did not care to show just what we were making on the property.

Q. Well you know whether that was the real reason or not? A. I do not remember the real reason.

Q. To whom was it you did not care to show just how much you were making? A. To General Reid I suppose as he was the only purchaser who did not know of it.

Q. What did Herbert know about it? A. I will rectify my other

statement and say that I do not know whether Herbert knew about it or not.

Q. Did you or Phillips or any one else to your knowledge give Herbert the least hint that you were making a secret profit on this transaction? A. No I never hinted that we were not making a profit on the property because I never considered for a moment that any one would expect us to go to Washington to sell to them land for what it cost us.

Q. Then why did you wish it not known? A. I gave all the details to Micou and as we were selling the property through him I naturally considered that he was the party to explain this if he saw fit as he had introduced us to the prospective purchasers.

218 Q. And if he did not see fit then what? A. I did not think it was any one's business.

Q. Did you not represent to Herbert and to General Reid that you were receiving your compensation for securing this option by means of the interest which you were to get in the promoters stock A. I certainly did not because the property was offered for sale at $25,000.00 before a Company or promoters stock was ever mentioned.

Q. Let me refer you to Complainant's Exhibit "A" which I believe you say was prepared by Phillips—is that correct? A. Yes sir.

Q. This Exhibit commences with the statement, "It is proposed to form a stock company with a capital of $150,000.00 to purchase the 4,000 acres," were you and Phillips and Reid and Herbert to be members of that stock company? A. I do not know what had been decided on at that time regarding the details of subscription because this was gotten up by Phillips to give an idea of what could be done.

Q. This Exhibit further states, "the property will cost $25,000.00. 50% in cash and 50% in 12 months;" you knew, did you not that the property would cost only $10,000.00? A. I knew that it would cost the Company $25,000.00.

Q. Did you explain to any members of the company besides Micou that under this phrase which I have quoted, namely;

219 "the property will cost $25,000," there was concealed two transactions under one of which you and Phillips would buy the property for $10,000.00 and under the other of which you and those whom you should induce to join in the enterprise would be made to pay $25,000.00. A. I did not.

Q. Let me quote further from this Exhibit, "the promoters are to receive 40% of the stock of the proposed company as their share for promoting and carrying out the enterprise," you were aware of the existence of this phraseology in this transaction were you? A. Yes I saw the prospectus.

Q. Let me read you from Complainant's Exhibit A No. 2, "to have a capital stock of $150,000.00 40% of which or $60,000 worth of stock to be given to Messrs. Phillips, Davis, Herbert and Micou as compensation for securing the land and the getting up and incorporating the Company afterwards to be organized," what did you understand this to mean? A. That this 40% of stock was to go

to us to be divided between Herbert and Micou, Phillips and myself, one-third to Herbert and Micou for the work of organizing the Company and all legal matters incident thereto; one third to me for looking after the interest of the Company in Cuba and one-
220 third to Phillips for managing the company and trying to carry out the scheme set forth of selling orange groves and that contract does not clear this matter up as it was understood at that time.

Q. Please attend to the question which I quoted, namely; "that you, Phillips, Herbert and Micou were to get this 40% of the stock," as compensation for securing the land and preliminary work of getting up and incorporating the Company afterwards to be organized," from whom were you to secure the land? A. We were to secure the land from Mrs. Acosta according to our option and sell same to the Company; in other words we bound ourselves to sell the land to the Company for $25,000.00 no more or no less.

Q. No sir there is not a word of that in the paper that I am reading, namely; "that you, Phillips, Herbert, and Micou would receive 40% of the stock of the Company as your compensation for doing two things namely, first securing the land and secondly the getting up and incorporating the Company? A. That is a fact that is stipulated in this written agreement but as a matter of fact all agreements are made verbally and a memorandum of the same is usually put in writing afterwards.

By Mr. DARLINGTON: Move to strike out the latter part of the answer as being incompetent.

Q. Referring to Davis Exhibit No. 2, it commences with
221 the statement that "Phillips, you, Herbert & Micou agree to purchase a tract of land," from whom were you to purchase it? A. From the widow Acosta.

Q. And not from yourself and Phillips? A. Phillips and I had the option on the land from the widow Tarafa.

Q. But I am speaking of this contract of 1904 where you agreed that five persons—two of whom were Phillips and yourself, would purchase this tract of land and I now ask you again, from whom were you to purchase it? A. I do not know what that contract says but we, Phillips and myself were to deliver this property to the Company to be formed. It is a fact I see that the contract states that we were to purchase from the widow Acosta all of us.

By Mr. DARLINGTON: I object to so much of the answer as undertakes to contradict the writing.

Q. The third paragraph of this memorandum further states that five persons of whom you and Phillips were two were to acquire this land for $34,000; from whom were you to acquire it for $34,000? A. The parties to the contract were to acquire it from Phillips and myself and we were to acquire it from Mrs. Tarafa.

Q. That is Phillips and Davis and others were to buy from Phillips and Davis for $34,000.00? A. Yes sir.

222 Q. Did you tell General Reid this? A. I do not remember.

Q. Don't you know? A. No, I don't. I know that we talked the matter over.

Q. Did you ever tell any person concerned other than Micou that the cost from Madam Acosta was to be less than $34,000.00 mentioned in this Exhibit? A. No.

Q. Now here is another paper not yet in evidence; can you tell me in whose handwriting the three signatures Phillips, Micou and Davis are? A. This is signed by Phillips, myself and Micou and Micou for Herbert & Micou is in Micou's handwriting.

Q. Now give us the history of that paper paying no regard to the pencil notations which were made afterwards and for which you are not responsible. A. Frankly I cannot give you the history of this because I never had a copy of the same and although I signed it I do not remember having ever seen it before.

By Mr. DARLINGTON: I offer this paper in evidence marked Davis Exhibit No. 5. It is stated upon behalf of the complainant that all the interlineations and erasures in this instrument, in fact everything about it except the signatures that is not in typewriting is no part of the contract as signed.

223 Q. Now Mr. Davis do you wish to be understood as stating that this is a reduction in writing of an accounting which you had with Micou acting for Herbert and Micou? A. Yes but I will state at the time Micou drew up this it was mentioned that probably $5000.00 added above $10,000.00 making a total of $15,000.00 would probably be expended.

Q. You are now attempting to explain are you that this paper—that the option was $15,000.00 for the land? A. No I am not. The option was not for $15,000.

Q. Does not this paper so state? A. It does.

Q. Now instead of its being an agreement that you, Phillips and Herbert and Micou would divide the cash profit and also divide the 40% promoters' stock how do you explain the fact that under this agreement there could be no profit except the difference between $15,000.00 and $25,000.00 and that no promoters' stock is provided for in this agreement unless some part of the difference between $15,000.00 and $25,000.00 the company was to pay should be paid in stock? A. This is just part of the agreement reduced to writing.

Q. You did not tell us that in your direct examination did you, that this was only a part of the agreement? A. I do not remember.

224 Q. Did you tell us that Micou objected that your agreement was only verbal and that it ought to be in writing so that there could be no misunderstanding later? A. As I remember the two contracts are necessary to embody the agreement between ourselves and Herbert and Micou. The promoters' stock has been provided for in the other contract and Micou drew this up in Richmond.

Q. That is the only explanation you can give us of the discrepancy between the contract you say you had with Micou and this reduction of writing that you say he made? A. I think that I have explained it fully.

Q. After Messrs. Reid and Micou arrived in Havana in March,

1904, who proposed going to Gray's orange plantation? A. I think I did.

Q. Who introduced General Reid to Howard? A. As I remember it General Reid was talking to Howard when I walked up.

Q. Is that your best recollection? A. It is.

Q. Did you not speak to Howard first and then introduce General Reid to him? A. I did not.

Q. Was it not you that asked General Reid if he would not like to have Howard go with you to Las Ovas? A. I think not but I do not remember definitely.

225 Q. On how many occasions were you there with General Reid at Las Ovas? A. At least twice.

Q. Any more? A. I think not but I do not remember definitely.

Q. When was the second occasion? A. I think that was in January, 1905.

Q. Who was with you besides General Reid? A. Mr. Norton.

Q. Why did Norton go? A. We had been considering the feasibility of pplanting oranges and had been considering with Norton regarding same and he wishes to see the land and examine it.

Q. Before making his estimate do you mean? A. I do not know; I think so.

Q. Well do you mean it so? A. Well I do not know that he told us before that what his regular price would be on the property.

Q. Had you ever gone there with Norton before? A. No.

Q. Had you not gone there with Norton in November and received a proposition from him for a contract and sent it to Washington in November, 1904? A. I think not.

Q. Let me show you this letter dated, November 9th, 1904, and ask you if it is your letter to General Reid? A. That is my writing.

Q. Let me read you from this letter, "I have been talking
226 with Norton of the Norton Bros., a very reliable firm of nurserymen and they are getting up a bid for the planting of our orange groves and I think that this will be much more satisfactory than to give the contracts to Captain Thayer, provided they make a satisfactory bid. * * * He is going to Las Ovas with me this week," did you write this letter? A. I did.

Q. Now let me show you your letter of November 30th, 1904, addressed to Colonel Geo. C. Reid, from which I quote as follows: "I have today written to Colonel Herbert enclosing a proposition made by the Norton Bros. Company for the planting of groves and he no doubt will show you my letter," do you recognize that? A. Yes sir.

Q. You say after you returned from Las Ovas in March, 1904, General Reid said he did not care how much you and Phillips made but he would share equally with Herbert & Micou if he went into the matter—is that correct? A. He said he would not go in unless he could share equally in the promoters' stock with Herbert & Micou.

Q. But that he did not care how much you and Phillips made? A. That is a fact.

Q. That he was willing that you and Phillips should each receive a third of the promoters' stock provided the remaining third
227 was divided between himself and Herbert and Micou, is that right? A. I do not know that he said that exactly and I did not say he did. He did not specify just how it should be divided, but said he would not go in unless he had as much promoters' stock as Herbert and Micou. Micou refused to give up any of his stock and as a result Phillips and I gave up part of our stock.

Q. How much land lies north of the railroad? A. I should judge about five or six hundred acres.

Q. Is there not a thousand? A. I think not. I thought so at that time.

Q. At what time? A. At the time of purchasing this property but Mr. Abbott informed me after the survey that there was not.

Q. How much land lies between the line marked red line and the line marked blue line? A. I do not know.

Q. About a thousand acres? A. I think not.

Q. Is it not a greater area than that north of the railroad? A. I think not.

Q. You paid Madam Acosta one quarter of the money she was to receive did you? A. As the cash payment, yes sir.

Q. Was that the arrangement with her that she would have one quarter of a cash payment and the balance in a year? A.
228 Yes sir I think that was agreed upon just before drawing up the deed.

Q. You must have had some arrangement about that before that did you not? A. None except what was in the option of March 16th, 1904.

Q. When General Reid left for Guantanamo leaving his check in payment, did you not know how much it would require? A. I do not remember. I think we did. However, I remember that Mrs. Acosta finally agreed to take a smaller amount on the first payment than she for some time contended for.

Q. General Reid's check was for $6,611.93 was it? A. $6,611.15 I think.

Q. What other checks were given at that time? A. Micou gave a check for $1200.00.

Q. What others? A. That is all that I remember.

Q. Did not you and Phillips each give checks? A. No, I think not.

Q. Let me read you from Davis Exhibit No. 2, last paragraph, "Mr. Micou hereby acknowledges receipt of the checks of the different promoters of the stock that they have subscribed to." You signed that paper then did you not? A. I did and will rectify my former statement or rather add to it by saying that I do not remember, the details.

Q. By way of refreshing your recollection do you not re-
229 call that Micou borrowed $1500.00 from General Reid with which to make a part of his payment? A. I remember

that Micou borrowed some money from General Reid, but I thought it was $1200.00 instead of $1500.00.

Q. Do you not further remember that this was not enough to carry all of Micou's stock and he said to you that he would like you to carry seven shares for him that he did not wish to borrow any more from General Reid and did you not put up a check for one half of seven shares for Micou in addition to your own ten shares? A. I think not.

Q. Did not Phillips also put up his check? A. I do not know. I remember that something was done or said about the other checks but as we were not really putting up any money I do not think that anything was done as it was not necessary.

Q. What did you do with the $1611.15 which was left out of General Reid's payment after paying Madam Acosta $5000.00? A. I know that after paying Mrs. Acosta there were $2800.00 left in cash of which Phillips took $1800.00 and I took $1,000.00.

Q. How did it happen that Micou got none, if he was in the arrangement with you which you have stated? Q. We took that to pay expenses which we had incurred in going to Washington and as I remember it paid $600.00 to Roma Guera and also the expenses of the deed from Mrs. Acosta to Escalante which should have been paid by us.

230 Q. Did you not collect the $600.00 Roma Guera commission from the Company? A. We did and it was a mistake.

Q. Why did you collect it from the Company if you had already paid it yourself? A. It was charged to the Company and as I remember Phillips put that in as a part of an assessment which was agreed upon to pay this commission and Mendoza's fee and some other matters, I do not remember what but as I remember amounted to about $1600.00. But I will state that this was a mistake in charging the Company with Roma Guera's commission.

Q. Was not the whole of that $1600.00 including Roma Guera commission, Mendoza's fee, cost of registering all the conveyances and the cost of the certificate of property from the Registrar of Property, in fact all charged against the Company and collected from the Las Ovas Company? A. I think they were.

Q. Arrellano bill was $400.00 for the entire services connected with all three of the deeds was it not? A. No I think not; his bill for the deed of Escalante to Micou and from Micou to the Las Ovas Company was $400.00.

Q. Is your recollection clear about that? A. That is the way I remember it.

Q. It is your recollection that Arrellano made a separate charge for the conveyance from Madam Acosta to Escalante in ad-

231 dition to the $400.00? A. I asked Arrellano to make out his bill for the deeds from Escalante to Micou and from Micou to the Las Ovas Company, but if I ever paid him for the deed from Mrs. Tarafa to Escalante I do not remember.

Q. Did you explain to General Reid either in March, 1904, or at any other time that his check paid the entire cash payment for the land and left a surplus? A. No.

Q. Did you not represent to General Reid that you had paid your other share of that first payment? A. Why it was implied.

Q. What was implied? A. That I had paid it. I do not remember having made a statement to that effect.

Q. What do you mean when you say that it was implied that you had paid your share? A. The deed had been signed and he was naturally aware of the fact that everyone concerned in the deed with the exception of Billings had paid his part.

Q. That is he supposed the purchase price from Madam Acosta was $35,000.00 and that each one paid his share. A. I do not know what he supposed.

Q. Is that not what you meant when you said a moment ago that it was implied that you had paid your share? A. Probably so.

Q. How much did you pay towards the purchase of the
232 land all told. A. Towards the actual purchase of the land I paid the $4650.00 on the last payment less the $2500.00 mortgage cancelled by Escalante.

Q. Well besides the $2500.00 mortgage you got 10% by way of interest on it making $2750.00? A. Yes except Phillips and Micou got their share of the interest until I bought them out besides what I paid them for their interest in the $2500.00 mortgage.

Q. What did you pay them for their interest in that mortgage? A. I do not remember. I made a settlement with Phillips on several matters including our personal accounts between each other. I did not pay him any actual cash and I gave some money to Micou in Washington and a note for $750.00 which I afterwards paid but I do not remember the amount of money I gave him in Washington.

Q. Did you ever send Micou any of the interest paid on the Escalante mortgage? A. I think not.

Q. Did Escalante get any of the interest on that mortgage? A. No.

Q. And none of the principal did he? A. No. I gave Escalante $400.00 from the $2500.00 for having acted in the matter.

Q. Have you any voucher for that? A. I have not.

233 Q. What was Escalante's business? A. Escalante was an employee of the Colonial Loan and Deposit Company and also attended to any business that Phillips and I gave him.

Q. He had a desk did he not in your Colonial Trust Co? A. He did at one time; I do not remember whether he had it then or not.

Q. Had he any property or resources? A. No.

Q. You gave him $400.00 for allowing Mrs. Acosta to make a deed to him and for executing a conveyance of the same property to Micou? A. And for holding a mortgage of $2500.00 and cancelling the same.

Q. What do you mean by his holding the mortgage? A. Well that is he retained it for a year.

Q. Why was that? A. Until it became due.

Q. He had no interest in it did he? A. No.

Q. Why then did he retain it? A. For Phillips, Herbert, Micou and me.

Q. Where was it kept? A. I think it was in my desk.

Q. Did Escalante speak or write English? A. No I think he understood English pretty well but did not speak it.

Q. Let me show you a letter purporting to be written by Escalante to Colonel George C. Reid of Feb. 21st, 1905, and ask you if
234 you know by whom it was written? A. I do not remember that.

Q. It was written in your Company's office on one of your typewriters wasn't it? A. I do not know.

Q. Is the signature in Escalante's handwriting? A. It is.

Q. Did you ever pay Escalante any interest? A. No.

Q. Did you ever represent to General Reid that you were paying him interest; that you had advanced it and wanted the Company to refund it to you? A. I do not know.

Q. You would remember a thing like that if you had done it wouldn't you? A. I do not know.

Q. Did you forward to General Reid the three papers which I now hand you purporting to be receipts by Escalante of three quarters interest of $62.50 each paid by you to him on account of this mortgage? A. I guess I did because I usually sent the receipts of the different amounts due to General Reid as Treasurer.

Q. Why did you send General Reid on three different occasions vouchers stating that you had paid Escalante the quarterly interest on this mortgage when as a matter of fact you knew that you
235 did not do so? A. It is the custom here to send receipts quite often signed before receipt of the money in order to collect same and the interest was due and those receipts were therefore sent.

Q. Did you not represent to General Reid that you had advanced this money to Escalante and ask that you be refunded this amount? A. I do not know.

Q. You knew when you sent each of these receipts did you not that you had not paid Escalante this money nor were going to do so? A. I did.

Q. Can you explain your action in sending the receipts under those circumstances? A. I can, the Company owed that interest.

Q. To whom? A. To Escalante as the Agent for Phillips, myself and Herbert and Micou.

Q. How had the Company become indebted to Herbert and Micou, you and Phillips? A. By the ownership of that mortgage which was held by Escalante for us.

Q. Why didn't you tell the Company or General Reid its Secretary and Treasurer that this interest was due to you and not to Escalante if that was the fact? A. Legally speaking it was due to Escalante.

Q. But as a matter of fact it wasn't? A. That is true.

Q. My question is, why in dealing with your associates
236 in this Company from which Company you held a power-of-attorney as its Agent, you did not tell them the true situation in regard to this mortgage? A. It is not my custom to always tell just what profit I am making out of any deal as in business it is not as a rule asked and business men do not consider what any

one is making and at the time I offered this property for sale at $25,000.00 there was no Company but after the Company was agreed upon I never bought anything else for the Company as a member of same at a profit to myself.

Q. I offer the four papers to which I have last referred being the Escalante letter of February 21st, 1905 and the three receipts marked Davis Exhibit No. 6.

Q. Was Escalante a member of or in any way connected with the Acosta family? A. No.

Q. And you think that you did not tell General Reid that Escalante came into this matter through some Acosta family connections? A. I think that I told General Reid that it was considered advisable to deed the property to Micou through a third party but I do not remember having told him anything else.

Q. Let me read you from a letter from you to Colonel Geo. C. Reid, of November 9th, 1904, which I will show you; "I also enclose
the following receipts $400.00 from Mendoza as attorney fee;
237 $100 from Aralleno on account of $400.00 as Notary fees;
the first receipt from Mrs. Acosta $375.00 as the first quarterly interest on $15,000.00 and the receipt of $62.50 from G. E. Escalante as the first quarterly interest on $2500.00 and here I will state that the $17500.00 which we still owed on the property was divided in this way by the owners of the property, their being two mortgages aggregating $17500.00; one for $15000.00 to Mrs. Acosta and one for $2500.00 to Escalante;" I asked you if it is signed by you and if what I have read is not contained in it? A. Yes sir.

Q. What did you intend General Reid to understand from your statement that the $17,500.00 which you still owed on the property was divized by the owners of the property, Mrs. Acosta taking $15,000.00 and Escalante $2500.00. A. That we the Company owed $17,500.00 of which Mrs. Acosta owner of the property retained $15,000.00 and Escalante when the legal owner of the property retained $2500.00.

Q. Escalante was never the owner of the property was he? A. He was according to the record.

Q. But he never was in fact? A. No sir.

Q. You knew did you not that General Reid did not know
238 this? A. If he did I did not know it.

Q. You did not intend him to know it did you? A. So far as I was concerned I did not care, but as Micou got General Reid first interested in this property and presented it to him I considered that Micou was the proper man to tell him if it were at all necessary.

Q. You did not consider that Micou had done anything improper in getting General Reid in this enterprise under the circumstances under which he was brought into it? A. I did not consider what Micou was doing but I did consider that what I did was perfectly proper.

Q. You mean you did not consider what Micou had done was perfectly proper? A. I did not consider what Micou was doing but considered that what I did was perfectly proper.

Q. If you did not consider at all Micou's action why was it you uesed the language in this letter that you wrote instead of stating frankly the true facts? A. I cannot explain any better than in the above statements.

Q. Let me read you from this letter page 2, "our bill of $437.50 for interest becomes due every three months and the people immediately present the bills to me for interest when they become due;" do you recognize that language in this letter of November 9th? A. That is there.

239 Q. Who were the people that presented the bills to you immediately as they became due as thus stated? A. Tarafa is the one who should have been stated there and I do not know to whom else that I could have reference regarding the bills being presented immediately.

Q. Tarafa presented no bills for $437.50 did he? A. No but I meant to convey that $437.50 was due every three months and should be paid promptly.

Q. I read from this letter November 9th, 1904, "I will send deeds on next boat," to what deeds did you refer? A. The deeds from Escalante to Micou and from Micou to the Las Ovas Company.

Q. Did you send them by the next boat or at any other time? A. I do not remember.

Q. Do you not know that General Reid came down here twice before he got them—once in January and once in March, 1905? A. I remember that he came down twice and we were having some trouble about geting the deeds but there was some delay, one of the principal reasons being that the Company had not paid in sufficient money for the transfer tax and registration and that I had repeatedly written to the Company requesting them to send this money.

240 Q. Let me read you from your letter to General Reid of January 30th, 1905, "you see after we make the final payment in March you will have in the deal about $20,000.00 and I will have about $13,000.00 and for that reason I think it best to try to get some of it back before we put anything more in," is this letter signed by you and do you recognize that language by you? A. Yes sir.

Q. What was the total amount you had paid on account of this property? A. I had not paid anything on the property except to take my profits in stock which I considered as cash.

Q. Instead of paying anything you and Phillips had taken $2800.00 in money at the time of the purchase in March, 1904, which was subsequently taken, $1333.00 from Dr. Sowers and you had been drawing 10 per cent. interest on the $2500.00 mortgage, had you not? A. Yes sir.

Habana, Cuba, April 28, 1906.

Q. Mr. Davis you are familiar with the signatures of General Reid. Micou and Phillips, are you? A. Yes sir.

Q. Please look at the draft I now show you dated, Havana March 19th, 1904, drawn by Geo. C. Reid on the Guardian Trust Company of Cleveland, Ohio, to the order of Benj. Micou for $6611.15 en-

dorsed Benj. Micou, Chas. T. Phillips and state whether the
241 signatures of Geo. C. Reid, Benj. Micou and Chas. T. Phillips are in the handwriting of those respective parties? A. Yes they are.

Q. Do you recognize that as General Reid's contribution to the first payment in March, 1904. A. I remember that a draft was drawn for the amount and was cashed at the Banco Nacional.

By Mr. DARLINGTON: I offer this draft in evidence as Davis Exhibit No. 7.

—. Please look at this check dated March 19th, 1904, drawn by Geo. C. Reid on Washington Loan and Trust Co., to the order of Benj. Micou for $1500.00 endorsed by Benjamin Micou, Benj. Micou and Charles T. Phillips and state whether you are able to identify the signatures of these gentlemen to this check as being in their own handwriting? A. Yes sir.

Q. Does this check refresh your recollection as to the amount Micou paid? A. No it is still in my mind that it was $1200.00.

By Mr. DARLINGTON: Check offered in evidence marked Davis Exhibit No. 8.

Q. Is it not a fact that in March, 1904 at your office in this city, Micou told you that including the Billings six shares of stock as generally subscribed for there was still seven shares not subscribed for, that he Phillips asked Micou to subscribe the seven shares and had promised him that he Phillips would see that you Davis
242 who had subscribed for only ten shares would help Micou carry the seven shares until he Phillips should get some groves paid for? A. I do not remember the conversation.

Q. And did you not tell Micou at that time and place just before you went to see the land that it would push you but that you would carry six or seven of the shares until Micou got in his fee or until Phillips got the sale of groves well started or words to that effect? A. I do not remember any such conversation.

Q. And do you not further remember that after your return from the land when you and the other parties were preparing your checks to make the cash payment Micou again said to you that he would like for you to carry the seven shares for him because he did not wish to borrow any more than $1500.00 from General Reid and that he would have to do so unless you would carry same. A. I did not.

Q. Did you not then say that you would do so and did you not put in for Micou a check for the amount called for by the seven shares in making up a cash payment? A. I do not remember if I did. I will state that Phillips and Micou attended to the details of closing that matter up a great deal more than I did and for that reason I did not know all of the details connected therewith.

Q. And is it not a further fact that when you and Gen-
243 eral Reid bought the Micou stock you took the seven shares and in the transaction settled with Micou taking into consideration your check given at the time the first cash payment was made? A. No sir I did not.

Q. When did you last see Hillary A. Herbert? A. Well in April.

Q. On the 8th day of April in Washington? A. I do not remember the exact date but it was some time close to that date.

Q. At this office? A. Yes.

Q. You mean this present month of April? A. Yes.

Q. Did you on that occasion ask Herbert if he had read the answer of yourself and Phillips in this suit? A. I think I did.

Q. Did he reply that he had not but that he understood that it is admitted or if not admitted it could be proved that the price for the land to the owner was $20,000.00 and that you and Phillips had gotten the difference between that sum and $35,000.00 and that he Herbert had concurred as President of the Company in bringing of this suit because he now had this understanding of the transaction. A. All except the latter part where he said he concurred as President.

Q. Is it your recollection that he did not say that?

244 A. He did not say it.

Q. Did you tell him in that conversation that you and Phillips had really paid $2500.00 to a broker in that transaction and asked if you would not be allowed that? A. I told him that the property actually cost us $20,000.00 except about $2500.00 which I estimated as actual expenses incident to the matter including brokerage.

Q. Did you tell him that you and Phillips had really paid $2500.00 to a broker in the transaction and did you not ask him if you would not be allowed that in this suit? A. I did ask him if the $2500.00 so mentioned would not be considered just as much a part of the purchase price as the $20,000.00.

Q. Please specify any items of expenses, brokers' fees, lawyers' fees, notary fees or other costs of any kind which you did not charge the Company for and receive payment from its members? A. I have been going over this expense account relative to this business this morning and I have never had an opportunity since the bringing of this suit to consult with Phillips regarding some of the expenses that were paid by him and cannot go into the details now regarding this matter and as I will be on the stand again I will then endeavor to give all details definitely.

245 By Mr. DARLINGTON: As I must leave Havana in about an hour will you please specify any item of cost which you did not charge against the Company and receive payment for from its members? A. I would prefer answering this when I may answer all details.

Q. Well cannot you name one item now, if there are any such items? A. I prefer going over all of my accounts before attempting this because I cannot remember those details.

Q. Please answer this question directly? Can you now state any single item of such cost or expenses which you did not charge against the Company and which was not paid to you by its members? A. As I have stated before I positively refuse to attempt to answer those items until I can do so definitely.

Q. Question repeated. A. I have answered this question to the best of my ability at present.

Q. Can you not tell us whether you remember any such item now? A. I think I remember several items but I can answer them definitely when I look over all of my papers and also after a consultation with Phillips to clear up a few items.

Q. Please state any such items which you now think you remember as having been charged to the Company and paid to you
246 by it or its members? A. One item as I remember was the expense of sending Mr. Abbott to Las Ovas to make a report on the land; another was the registration of one of the deeds of the Company.

Q. Any others? A. One of them as I remember was the transfer tax on one of the deeds but I do not remember which one without looking it up.

Q. Why was it that you omitted these items, if you did omit them from the charges against the Company? A. I think that most of them were mentioned to General Reid and there are a few accounts that I have now pending a final settlement with General Reid as Treasurer of the Company.

Q. Please look at the papers which I now hand you purporting to be your receipt to Colonel George C. Reid for $565.33 as his proportionate share of $1696.00 expenses advanced by Chas. T. Phillips and yourself for the Las Ovas Company signed by you and dated May 13th, 1904, and state if that is in your handwriting? A. It is.

Q. *With* Abbot's items that you have just referred to was really paid by you it was prior to the date of this receipt wasn't it? A. Yes sir.

Q. How did it happen that you omitted it in your statement? A. I do not remember just what was included in that
247 $1600.00.

By Mr. DARLINGTON: I offer this paper in evidence and ask that it be marked Davis Exhibit No. 9.

Q. Why were any expenses omitted from it which had been incurred up to that date?? A. As we were selling this land to the Company at a profit and agreed to deliver the property to the Company at its fixed price there were naturally some items that we were willing to pay ourselves and which we did not care to charge to the Company but when it is asked just what the land cost us there are items above the $20,000.00 which we did not charge to the Company.

Q. State fully what reasons there were for not charging the Abbott report to the Company and yet charging it with your commission to Roma Guera your attorneys' fees and the like? A. Roma Guera did quite a lot of work in connection with this transaction and especially in inducing Tarafa to sell the property north of the milroad and the property including Cayo Robla and also in the final conclusion in putting in the Lake and as I now recall it it was considered that his services in that were worth the $600.00 and that he had done quite a lot of work for the Company and as to Men-

doza while it is true that we had sent the titles or part of them to
him for examination before we ever met the gentlemen con-
248 nected with this deal he did make a report to Micou and
superintended the drawing of the deeds and the Company
got the benefit of his services.

Q. And the Company did not get the benefit of the Abbott report? A. The Abbott report was first made for the benefit of Phillips and myself.

By Mr. DARLINGTON: I object to the answer as not being responsive and ask the witness now to answer directly.

(Question repeated.)

A. I think it did because for if it had not been for the Abbott report it is probable that the Company would not have gotten the benefit of purchasing this land.

Q. Let me ask your attention to the fact that I did not ask your reasons and request that my further questions will be answered directly.

Mr. PUTNAM: I will instruct the witness that he has a right to answer the question in his own way.

By Mr. DARLINGTON: I do not think Mr. Putnam desires to go on record to the Court as stating that the witness has the right to make an unresponsive answer and to add to his answers things that are foreign to the questions.

By Mr. PUTNAM: I have not so instructed the witness but I do instruct him that he has a right to answer the questions in his own way so as to make his answers clearly understood.

Q. Now returning to your interview with Mr. Herbert in
249 Washington, in replying to your question did he not say
to you that he did not think you would be allowed the $2500.00 brokerage claim? A. I think he did.

Q. And did he not further say, even if you were allowed it there would still be a judgment against you and Phillips for the $12,500.00 or difference between the $15,000.00 increase and the $2500.00 brokerage claim? A. I think that was his opinion but I did not agree with him. We were merely discussing the pros and cons from a legal standpoint.

Q. I shall not ask you what opinions you agreed to but simply as to what occurred. Now did you not then say to him "we did not get all of this money," and to his remark "why you have just now admitted that you got it," did you not reply that the money was not actually paid it was simply marked as paid, but did all of it go to the purchaser or to any one else? A. No.

Q. You did not say that or words to that effect? A. I did not say that I am sure, but as I said before we were discussing this matter.

By Mr. DARLINGTON: I object to your telling us what you were discussing, I am asking you a direct question, did you use the language which I stated to you at the time and place mentioned? A.
Colonel Herbert said that he thought that it would be best
250 for all parties concerned to compromise this matter.

By Mr. DARLINGTON to Mr. Putnam: Do you think that the witness has a right to make such an answer to my question.

By Mr. PUTNAM: No, I instruct the witness to answer that question yes or no.

A. I do not remember as having said those words, but I do remember of something to that effect being said.

Q. Did Herbert reply, "I see now what you mean, but it will be hard for you all the same," and did you answer, "but they cannot hold me for the money and cancel my stock too can they,"—is that correct? A. Not exactly in that way.

Q. In what respect is the language I quoted incorrect? A. Colonel Herbert said that this ought to be settled.

By Mr. DARLINGTON: I object to the answer and will state that this is the question which you will please answer. Did you ask him either exactly or in substance whether they could hold you for the money and cancel your stock too? A. I asked him if he really thought that and told him that I considered it absolutely impossible to do such a thing, by law.

Q. Please remember Mr. Davis I am not asking you what your opinions of the law are but only what occurred; did you then ask him exactly or in substance as follows: "do you think that
251 they can cancel the stock I bought from Micou? A. Yes sir.

Q. Did he reply in substance if not exactly, "no I do not think they could, Micou knew nothing about the secret agreement by which you got that difference or were credited with it and so I think your title to that stock would be good?" A. No he did not.

Q. And did you reply, "yes that is what I thought?" A. No.

Q. You and General Reid agreed on the purchase of the Micou and Phillips stock dividing it among you, did you not? A. I was trading for myself and he was trading for himself.

Q. But that is not answering the question, which question I will ask the stenographer to repeat?

Q. You and General Reid agreed on the purchase of the Micou and Phillips stock dividing it among you, did you not? A. We agreed to buy the stock from Phillips and Micou but we did not buy it together and divide it.

Q. You agreed beforehand how much each should buy, did you not? A. Yes.

Q. Did you tell General Reid then that Phillips had paid nothing for his stock? A. I did not.

Q. Did you tell General Reid then what you are claiming now that Micou paid only in part for his stock? A. No.

252 Q. You allowed him to go on and buy it when you knew Phillips had paid nothing and when you claim that Micou had only paid $1,200.00? A. I did.

By Mr. PUTMAN: I object to the question because the witness has not testified that he knew Phillips had paid nothing.

A. I did not consider that what Phillips or Micou or any one

else had paid for their stock had anything whatever to do with this and I considered the stock worth more than he paid for it.

Q. Now when General Reid had bought practically half of the Phillips and half of the Micou stock why did you not divide the Escalante mortgage with him in the proportion in which they would have been entitled if they had not sold? A. Because I did not think he was entitled to it.

Q. How much of this Las Ovas property is there south of the southerly boundary acquired by the Las Ovas Company of which you did not buy? A. I do not know but I think there are about 3,000 acres.

Q. How does it compare with the other part of the tracts? A. I do not think that it is anything like as good as the other land and is not as well located; it is further from the railroad and also from Pinar del Rio.

Q. How much further than this part between the blue line
253 and the line E. D. on the sketch? A. It adjoins the line E. D.

Q. Then although you thought the 5,500 acres was worth $40,000.00 you did not think that this land was worth a dollar an acre? A. I considered this tract of land south as of very little value because there is a strip of land going right through the middle of it which is swampy all the year round.

Q. Your answer is consuming time and is not answering my question. A. We could have bought that land at that time for the Company for $5,000.00 additional and I did not think enough of the land at that time for us to purchase it.

Q. The Tarafa option in this case shows that this land was offered you for $3,000.00 in addition for what you had agreed to pay for the land which you actually got; can you explain why you did not take it? A. For the above reasons and this did not include the censos being found on the property and the subsequent reduction of $2,000.00.

Q. Returning to the purchase by you and General Reid of the Micou and Phillips stock, did you not tell General Reid when you broached the matter to him that Micou and Phillips would sell their stock for just what it cost them? A. I do not remember.

Q. Returning now to Escalante and his interest; I show
254 you a letter from yourself to General Reid of October 18th, 1904, and call your attention to this quotation from it; "the balance of $62.50 is due to Escalante and I also will have to draw for this soon as I have not yet seen him. This mortgage was subdivided some way among the family;" is that your letter? A. It is.

Q. How was the mortgage subdivided among the family? A. That is a mistake.

Q. Why did you make this mistake? A. I do not know why I ever make a mistake.

Q. Please look at this letter from yourself to General Reid of February 17th, 1905, from which I read this quotation; "I am in receipt of your favor of the 12th, and according to your instructions

I have paid Escalante the interest for the two quarters and enclose you receipts for the same," is that your letter? A. Yes sir.

Q. Did you pay Escalante the two quarters interest referred to in this letter? A. I did.

Q. Were you mistaken just now then when you told us over and over again that you had never paid Escalante any interest and that he had no interest in the mortgage? A. What I stated last night was I had never paid Escalante any interest for himself per-
255 sonally; that I had paid interest to Escalante as I did in this case for the Company and which was paid to him as the Agent for Micou, Phillips and myself.

Q. What did he do with it? A. He turned it over to us.

Q. To whom? A. Either to me or to Phillips.

Q. Did you pay him by check? A. No.

Q. Do you mean to tell us that you handed this interest to Escalante and had him hand it back to you again? A. No I mean to say that so far as the Company was concerned it was paid to Escalante and was done so and taken into account against any assessments that might be due.

Q. Now dropping fictions and imaginary processes which never took place, did you ever pay any interest to Escalante? A. No except as above stated.

Q. Please give us a plain answer to this question? Did you ever paid Escalante $125.00 or any other sum as interest on this mortgage? A. No except as above stated.

Q. By except as above stated you mean that you claimed to have done so but the money never really left your possession? A. No.

Q. Did the money leave your possession? A. No.

256 Q. Now first look at this letter of May 1st, 1905, addressed to General Reid and signed by you and state whether that is your hand writing? A. Yes sir.

By Mr. DARLINGTON: I offer this letter in evidence being Davis Exhibit No. 10.

By Mr. DARLINGTON: As my steamer leaves in five minutes I must here suspend leaving Mr. James E. Runcie to continue the cross-examination of the witness and reserving the right to take such further testimony in Washington as I may consider necessary.

257 HABANA, CUBA, *May* 5, 1906.

Continuation of Cross-examination, by Mr. JAMES E. RUNCIE:

By reason of the departure from Havana of Mr. Darlington, Counsel of record for Plaintiff, the cross examination of the witness was by consent of counsel for the Defendant, continued by Mr. RUNCIE.

Q. You have testified that according to the original agreement for the division of 40% of the stock that stock was to be given to yourself, Phillips and to the firm of Herbert & Micou in consideration of services to be rendered; what services, if any have ever been rendered to the Company by Phillips in consideration of that stock?

A. In the month of June or July, 1904, Phillips went to Washington to open an office of the Company to sell orange groves on the installment plan as had been agreed upon; he also got out the circulars and pamphlets and he went to Memphis, Tenn., Nashville, and Chattanooga and got several subscribers to groves and at one time some where in September or October as I remember he brought one representative from Nashville, Tenn., and an Agent he had appointed for selling groves. From Chattanooga he sent a man who was selected by the subscribers to groves to make a report on the property and this Agent came to Cuba and visited the property with me and made a favorable report but he failed to get enough
258 subscribers in any place to make it worth the Company's while to go ahead with the business. He was in the States about four months working on this proposition.

Q. And those services were rendered by Phillips in consideration of his share of the 40% of stock referred to? A. That was part of the agreement.

Q. Was he not to receive other compensation for those services? A. As I remember the Company agreed to allow him a fixed commission out of which to pay their Agents that he would employ for selling the property but I cannot say.

Q. I show you a paper dated, Washington, July 1st, 1904; do you recognize the signature to that paper? A. Yes sir.

Q. This contract states that Phillips was to receive 5% commission for selling the groves? A. As I understand this was to pay the Agents.

Mr. RUNCIE: Objection made to a statement of what the witness understands and motion to strike out the last part of his answer.

By Mr. RUNCIE: I offer this paper in evidence and ask that it be marked Davis Exhibit 11.

Q. Do you know of any other services that were rendered to the Company by Phillips under that agreement for the 40% of
259 the stock? A. None that I recall.

Q. When was Phillips share of the 40% of stock issued to him? A. I do not know.

Q. Can you state whether it was before or after the contract of July 1st, 1904, just offered in evidence? A. No, as I remember I received my stock a month or two after that agreement and I do not know whether his was delivered to him at the same time or not.

Q. But you know that Phillips received his share of that stock? A. Yes sir.

Q. And he participated also in the profits of the $15,000.00? A. Yes sir less the expenses.

Q. What services, if any did the firm of Herbert & Micou render under that contract? A. Micou came to Cuba to examine the property and also to have the title examined and I think they drew up the charter and by-laws of the Las Ovas Company.

Q. And for this service did they receive one-third of the profit of $15,000.00, plus one third of the 40% of stock referred to? A.

No the division of the 40% of stock was changed according
260 to agreement and when we made the second contract where General Reid became a participant to the amount of one quarter of this 40% of stock.

Q. Then instead of one third of the 40% of stock they received one quarter and in addition received one third of the $15,000.00 profit, less expenses? A. As I explained the other day they received at the time of the signing of the first deed $2,000.00 in profit which thy took in stock and they then owned a share in the $2500.00 mortgage which I bought from Micou.

Q. Did the firm of Herbert & Micou receive all that they were entitled to under the modified agreement to which you refer by which General Reid became a participant in the 40% of promoters stock? A. Yes sir.

Q. Who received this for the firm of Herbert & Micou? A. Micou.

Q. In all your transactions with Micou did you consider yourself dealing with him personally or with him as representing the firm of Herbert & Micou. A. The firm of Herbert & Micou—with him as representing the firm of Herbert & Micou.

Q. Do you know whether any stock was issued to the firm of Herbert & Micou? A. I did not see any stock in their name, but I remember that General Reid insisted that the stock should be
261 issued in the name of Herbert & Micou. I never saw the certificates.

Q. But do you remember whether it was so done or not? A. I do not know how it was done.

Q. Did you in any of these transactions have any dealings with Herbert as representing the firm of Herbert & Micou? A. I did not have any dealings with Colonel Herbert at all.

Q. What services were rendered by yourself under the same agreement for the division of the 40% of stock? A. I went to Las Ovas several times. One time in connection with the survey of the property and at one time with a prospective purchaser of some property; another time with the representative of the subscribers to groves from Chattanooga and several times to look after the rents to make new contracts and to collect rents.

Q. Is that all? A. That is all that I remember.

Q. Did you not undertake to secure the record of the Company's deeds in Cuba? A. Yes sir I did.

Q. Did you secure that record? A. I went to Pinar del Rio once and got one of the deeds recorded; that is all that I remember about that.

Q. Was that the deed from Sra. Acosta to Escalante? A. No Tarafa attended to having that done.

262 Q. Was it the deed from Escalante to Micou? A. I do not remember, but I think it was the deed from Micou to the Las Ovas Company.

Q. Were not the deeds from Escalante to Micou and from Micou to the Company recorded at the same time? A. I do not remember.

Q. It is in evidence or will be that both of those deeds were re-

corded on March 17th, 1905. Did you secure the record of those deeds? A. I must have but I am not sure that I secured the record of one of them.

Q. Why was the record of those deeds so long delayed? A. General Reid as Treasurer of the Company did not pay Notary Arellano the money for one of these deeds until January the 19th, 1905.

Q. Money for what purpose? A. For the transfer tax which had to be paid first and afterwards the registration.

Q. Why was that money supposed to be paid to Arellano? A. because he had agreed to attend to this on the payment of the money.

Q. But you have just testified that you had undertaken to attend to it? A. This was the way I undertook to attend to it as I always do with all of the deeds of the Company with which I was connected and found it more satisfactory to have Arellano attend to this.

263 Q. Then what you really meant when you state that you attempted to secure the recording of these deeds was that you undertook to secure somebody else who would undertake to have them recorded? A. Yes sir if you put it that way.

Q. Do you know that certain penalities were incurred for the delay in payment of the taxes on these deeds prior to their record? A. I did and I so wrote the Company repeatedly asking that they send the money for this.

Q. You collected the money for the Company from the tenants on the Company's land did you not? A. I did.

Q. Have you ever presented a complete account of the monies received and disbursed by you for the account of the Company? A. I think so.

Q. Are you not certain? A. I rendered several accounts to the Company regarding this and as I remember I rendered a final account to Messrs. Runcie & Lamar, or at least paid them all of the money that I had collected from the rents that I had not turned over to the Company before.

Q. Did you take a receipt from Runcie & Lamar for the amount which you delivered to them? A. I gave them a check for this but I do not remember whether or not I asked or took a receipt.

264 Q. Have you ever rendered a final statement of your account of monies received and disbursed by you for the account of the Las Ovas Company? A. I think so.

Q. Have you no accounts pending with the Company? A. Yes the Company owes me for some expenses that I had in connection with this matter, but I have not got the account yet, but as I remember it is about $100.00.

Q. Were those expenses included in the final statement of account which you think you rendered to the Company? A. I think so.

Q. Can you produce a copy of that statement of account? A. I think so.

Q. Will you do so? A. I will if I have it.

Q. You have previously testified that you thought you would be able to answer definitely about the various amounts charged to the Company after consultation with Mr. Phillips; have you consulted

with Phillips since your previous examination? A. I have not been able to go over the accounts with Phillips but I have been looking up all of my papers regarding this matter and think that I can now answer these questions so far as I personally am concerned.

Q. Have you seen Phillips since you testified before? A. I have.

Q. Did you make no effort to consult with Phillips? A. I did.

I had a talk with Phillips Sunday and he agreed to come
265 down to my office to go over those matters and left word that he was called back immediately to Camaguey and I did not go over it with him.

Q. When did Phillips arrive in Havana? A. Sunday, April 30th.

Q. How long did he remain in Havana? A. I think he remained until Tuesday.

Q. Where is Phillips now? A. I think he is in Camaguey, Cuba.

Q. When did Phillips inform you that he was called back to Camaguey? A. He sent me word that I got the next day after he had left.

Q. Then you did not know that Phillips was going away until after he had gone? A. I did not; in fact he told me that he would try to remain over to give his deposition in this case.

Q. How many times did you see Phillips while he was here? A. Twice.

Q. How long were you with him on each of those occasions? A. On the Sunday that he arrived here I was with him for about an hour or two and I think it was on Monday or Tuesday afternoon I saw him about ten minutes.

Q. Have you heard from him since he went away? A. I have not.

266 Q. Will Phillips return here? A. I do not know—I certainly hope so.

Q. Are you now able to recall any item of expense attendant on the transfer of the property from Sra. Acosta to Escalante and from Escalante to Micou which was not charged to and ultimately paid by the Company? A. The transfer tax and the registration of the deed from Sra. Acosta to Escalante was by mistake charged to the Company but to rectify that mistake I personally paid $381.90 transfer tax on the deed from Escalante to Micou and $54.63 for the registration of either a deed from Escalante to Micou or Micou to the Las Ovas Company or both, I do not remember just what it was.

Q. Have you any vouchers for those payments? A. I have I am sure.

Q. Will you produce them? A. I have not got them here but I will produce them.

Q. Do you remember a item of $97.00 paid to the Register of property at Pinar del Rio for a certificate of title issued on March 24th, 1904 and charged to the Company? A. I did. Mr. Mendoza asked for a certificate from the Registrar of Property and that was in payment of this certificate.

Q. At that time you held an option on the property? A. We did.

Q. Had you any other evidence than that certificate that your option to the property was of no value so far as the title to
267 the property was concerned? A. No Mr. Mendoza had had the titles of the property in his possession for some time before this and the certificate of the registrar of property was merely to see if there had been any other changes affecting the property other than the titles he had.

Q. As an option holder you derived the benefit of that certificate? A. Yes sir.

Q. And Escalante as purchaser from Sra. Acosta derived a benefit from the certificate? A. Yes sir.

Q. Why was the cost of the certificate charged to the Company? A. It is always customary here in Cuba to get a new certificate from the Registrar of Property before signing a deed even if there has been another certificate secured a very short time before and it was necessary for the Company to have this certificate but it was not necessary for us to have it until we were ready to sell the property.

Q. The property was deeded to the Company on September 15th, 1904, six months after the date of this certificate; was a new certificate procured from the Registrar of Property at that time according to the custom, which you have testified to? A. No because the property had been deeded to Micou and we knew that he would not deed the property without letting the Company know and
268 I will change my above statement to the effect that in some cases like this this rule is waived where there is confidence in the party holding the property.

Q. How much did you pay the Notary Arellano altogether for the three deeds involved in this transaction? A. I have only been able to find a record of $400.00 for all that was ever paid him as his fees.

Q. That includes the cost of the deed from Sra. Acosta to Escalante? A. It does unless something else was paid to him of which I have found no record. I usually gave Arellano so very much work to do that where he made any deeds which I personally was to pay he usually made a very low price on the same; much lower than the regular fees.

Q. I show you a letter dated, December 12th, 1904, purporting to be signed by you; is that your signature? A. Yes it is.

Q. The letter refers to an enclosed letter from Arellano; is the attached letter the enclosure referred to? A. Yes.

Mr. RUNCIE: I offer these letters in evidence and ask that they be marked Davis Exhibit No. 12.

Q. In the accounts which you think you presented to the Company, did you state that the $400.00 paid to Arellano was for only two deeds? A. I do not know. I was under the impres-
269 sion that the $400.00 was for the two deeds but I see from the letter which I sent the Company signed by Arellano, which you have just presented as Davis Exhibit No. 12, states that the $400.00 was for the three deeds.

Q. Did you procure Arellano to present an account for two deeds

which should cover his fees for the three deeds? A. No, I asked Arellano to send his bill for the deed from Escalante to Micou and from Micou to the Las Ovas Company.

Q. Reading from a letter dated, October 20th, 1904, purporting to be signed by you, I find in a settlement of your disbursements this item: "To Jose R. Arellano the Notary on account of the $400 Notary fees for two deeds, deed to Micou and deed from Micou to the Las Ovas Company, leaving a balance due him of $300.00....$100." Do you recognize the signature to that letter? A. I do.

Q. That letter was written by you containing that statement? A. It was and as I have stated before I thought this $400.00 was for the two deeds mentioned.

Q. But Arellano did not think so? A. I do not know it seems not from his letter.

Q. It appears in evidence that the transfer tax due and paid on the deed from Sra. Acosta to Escalante was $247.62; you
270 have testified that that amount was improperly charged to the Company and that in compensation for it you paid $381.00 tax plus $54.00 recorder's fees on some other deed or deeds; how was the balance in your favor resulting from those payments ever settled? A. I do not think that it was ever settled. I charged the $54.63 to the Company but the difference between the $247.62 which I should have paid instead of the $381.90 which I did pay, I paid myself for having made the mistake.

Q. You simply took no account of it? A. Not that I remember.

Q. It is to be understood then that the $54.00 of recorder's fees which you previously testified to having paid in rectification of the erroneous charge of $247.62 was really charged to the Company? A. Yes sir.

Q. You have testified that your first option on this land was given to you by Sra. Acosta in January, 1904; was anything whatever done under that option? A. Yes we purchased the land under that option.

Q. That option covered how much land, approximately? A. We estimated that it covered about 4,000 acres.

Q. Did you ever make a purchase limited to the 4,000 acres, approximately? A. No.

Q. Was not that option cancelled and superseded by the
271 option of March 16th, 1905? A. As I considered it the option of March 16th, was an amplification of the option of January, 1904.

Q. But it was a new agreement between you and the owners of the property? A. It was.

Q. And took the place of the agreement which you called an option and which was made early in January, 1904? A. Yes by adding to it.

Q. Did you ever offer to sell your rights under that option to anybody? A. No.

Q. You never offered to dispose of any option that you held? A. No.

Q. The realization of that option would have called for a con-

veyance to yourself—you and Phillips, would it not? A. The conveyance to Phillips and myself and Herbert & Micou.

Q. Was any such conveyance made? A. No it was made to Escalante who acted for all of us.

Q. Is there anything in the deeds to Escalante which disclose that he was acting for anybody else than himself? A. No.

Q. Had you any private acknowledgment from Escalante that he was acting for you and your associates and not for him-
272 self? A. I think not.

Q. Was there anything in the deed by which Escalante took a mortgage for $2,500.00 from Micou to disclose that he was not the real mortgage creditor? A. No.

Q. Was there any reason why that mortgage should not be made to Phillips, Herbert & Micou and yourself jointly? A. As I have stated before in my testimony this mater was discussed; that is the advisability of deeding it to all of us and I recall now that Micou objected to this and therefore we agreed to put it in the name of Escalante.

Q. Do you recall the reasons which Micou gave for his objections? A. I do not.

Q. Was that mortgage in any respect different from a mortgage such as is commonly given in the United States? A. I do not know enough law to answer that question.

Q. If Escalante had died before that mortgage was released and cancelled by deed could you, Phillips Herbert & Micou have released the mortgage on payment of the principal?

By Mr. PUTNAM: I object to the question because it is not shown that the witness is a Cuban Lawyer or is competent to answer it.

A. I do not know.

Q. Was that mortgage in any respect different from the
273 ordinary mortgages on real property such as are commonly given in the United States? A. I do not know.

Q. I will read to you from a letter dated, December 5th, 1904, purporting to be signed by you this statement; "in regard to the mortgages which I spoke of to Madam Acosta and Escalante I will state that these are not mortgages such as you are accustomed to in the States, but simply state that we owe a balance of $17,500.00 on the purchase price of the property and that we are to pay $15,000.00 of this to Madam Acosta and $2,500.00 to Escalante." Is that your signature? A. It is.

Q. You made that statement? A. I did and as I remember it was in reply to a letter of General Reid in which he did not seem to understand it and I was trying to clear the matter up in his mind.

Q. Will you now state in what respect these mortgages are not mortgages such as General Reid is accustomed to in the States? A. As I further remember General Reid's letter to me stated that he did not understand why there should be any mortgage on the property and that he understood that this was not a mortgage and I

think I was trying to answer him in regard to the idea set forth in his letter.

274 Q. Have you General Reid's letter? A. I think so.

Q. Will you produce it? A. I will if I have it. I remember that I had a lot of trouble in trying to explain to the General about this.

Q. Now will you explain in what respect these mortgages, in your opinion when you wrote this letter differ from such mortgages as General Reid was accustomed to in the States? A. I do not think I can explain it.

Q. You have testified that you made this statement contained in this letter for the purpose of clearing up the matter to General Reid's understanding this statement would give General Reid to understand that these mortgages were not what he would understand as mortgages in the States? A. I do not think that this letter exactly explained what I was trying to convey to the General, for as I remember he said in his letter that he did not see why a mortgage should be given on the property; I must have taken for granted that this was different from the way that it would be done in the States.

Q. Your statement in the letter is that, "the mortgages simply state that we owe a balance of $17,500 on the purchase price of the property," is that true? A. I think so.

By Mr. PUTNAM: I have not objected up to this time to
275 the many questions which I consider incompetent and now object because the instrument in writing is the best evidence of what it states or what it means.

By Mr. RUNCIE: The object of these questions is not to find what the instrument states, but what the witness meant when he made the statement and what he understands of that meaning now.

By Mr. PUTNAM: I have no objection to the witness answering any questions of that tenor.

Q. The deed from Mrs. Acosta to Escalante stated that she retained a mortgage of $15,000, did you not know that the property would be sold to pay that balance of the purchase price if it were not paid when due by the purchasers? A. I knew that it could be sold.

Q. Are you now able to state any difference between these mortgages and such mortgages as are made in the States to which you referred in your letter just quoted? A. I do not think I understand the law sufficiently to undertake an explanation.

Q. Did you when you wrote this letter understand the law sufficiently to make this statement intelligently? A. I have explained why I made that statement because I gathered from the letter of General Reid that it would have been done differently in the States.

276 Q. Did you when you made the statement contained in this letter understand the law sufficiently to know what your statement meant? A. Probably not.

Q. Did you ever inquire of anybody whether there was any dif-

ference between these mortgages and such mortgages as are given in the States? A. No.

Q. Did you make this statement on your own authority? A. I did.

Q. You further stated that "we are to pay $15,000.00 of this to Mrs. Acosta and $2500.00 to Escalante," was any sum whatever to be paid to Escalante? A. It was.

Q. Have you not testified that Escalante had no interest in that mortgage? A. I do not remember having testified to that.

Q. Have you not testified that Escalante took that mortgage and held it solely for the benefit of yourself, Phillips and Herbert & Micou? A. I have.

Q. Then any money nominally due to Escalante under that mortgage was really due to you and your associates named? A. It was.

Q. And you took that mortgage to secure the payment to yourselves for the sum due under it? A. Escalante took it for us to secure the payment due under it.

277 Q. When Escalante took it did he not do so to secure the payment to you and your associates? A. Yes sir.

Q. And you subsequently acquired the interest of your associates in that mortgage did you not? A. I did.

Q. Are you now able to state the consideration which you paid to Phillips and to Micou for the interest held by them in that mortgage? A. I have not been able to find all of my records on this matter; I found that I paid Micou $750.00 and that I paid his part of the transfer tax and registration for one of the deeds but I have not been able to find any record of the amount of money I paid him other than stated. What I paid him, however, was also for the stock which I bought from him. Micou came to me when I was in Washington in January, 1905, and said that General Reid knew about the three deeds and what the property had cost us and that he did not like it and that he thought it would be better for him to get out and in consideration of my purchasing his stock and the interest in the mortgage I remember that he made a reduction because I did not care at that time to make any further investment in it as I did not have the money. I have not been able as I stated to go over the accounts with Phillips to see just what I paid him

278 (Phillips) for his stock as we were making settlements on several matters and at that time I do not think any actual cash passed between us. However, on the last purchase of the seven shares of stock I paid him $1500.00 in cash but this purchase also included an equity which he held in some other stock and I bought his interest in both. In a lump sum I estimate this about five or six hundred dollars.

Q. So that after you bought Micou's stock, Micou had no further interest in the Company? A. No.

Q. And after you and General Reid bought Phillips' stock, Phillips had no interest in the Company? A. No.

Q. Have you since sold any of the stock acquired by you to Phillips? A. As I explained before I gave the seven shares of stock back to Phillips in another settlement but I do not think this trans-

fer was ever made on the books of the Company and I afterwards repurchased it.

Q. Do you remember when Phillips sold his stock and resigned from the Company as Manager? A. I think it was January, 1905.

Q. I show you a letter appearing to be signed by Phillips—are you familiar with the signature of Mr. Phillips? A. I am, yes sir.

Q. Is that his signature? A. It is.

279 Mr. RUNCIE: I offer this paper in evidence and request that it be marked Davis Exhibit 13.

By Mr. PUTNAM: I object as not being offered in the proper way and is incompetent.

Q. You have spoken of taking your profits in stock; please explain what you mean by that? A. The way it was done virtually amounted to that because in the purchase from Mrs. Acosta to Escalante at that time there was a margin of $15,000.00 and we took this mortgage and applied it towards any payment to Escalante from Micou—I mean to say that we took this profit and applied it towards the payments of stock for which we had subscribed.

Q. Did you subsequently take an option on the remainder of the tract "Sobrantes de Las Ovas," which had not been included in the sale to Escalante? A. Yes sir.

Q. What were the terms of that option? A. $8,000.00 for the remaining part of the property.

Q. How many acres are there in the remaining part of the property? A. I do not know, I should judge there were two thousand or twenty-five hundred acres.

Q. Was that option in writing? A. It was.

Q. When was it dated, do you remember?? A. I do not remember but I think shortly after the signing of the deed.

280 Q. But you did not purchase the property under that option? A. No.

Q. Why not? A. I do not remember.

Q. Can you recall approximately the price per acre which you were to give for acquiring that property under the last option? A. We estimated that it would be about $2.50 an acre.

281 Redirect examination by Mr. PUTNAM:

Q. You testified in answer to Mr. Runcie's question that you never offered to sell the option or your rights under it to any one, is that a fact? A. I offered to sell the property which I held under the option.

Q. You say that Micou came to you and told you that it was better for him to get out—better for whom? A. For Micou.

Q. Did he say that it would be better for you for him to get out? A. I think he did.

Q. You say in answer to a question of Mr. Runcie that $54.00 recording fee was charged to the Company and I will ask whether the Company ever paid you that $54.00? A. No.

Q. How long did you manage the property in Cuba after the transfer of it to Micou? A. About a year.

Q. How did your management end? A. Runcie and Lamar were given the power-of-attorney of the Company and then took charge of the property.

Q. Did you ever receive any compensation for managing the property? A. Nothing. I devoted quite a lot of time to it
282 and received no compensation whatever except the promoters' stock which was given practically for that.

Q. You say that when the stock was divided 40% of it was called promoters' stock and of this you took one quarter, Phillips one quarter, Micou one-quarter and Reid one quarter; you have already testified and General Reid has testified that he took 35 shares of the remainder and paid some $6811.00 in cash; you took according to your testimony six shares intended for Billings and afterwards sold that stock to Dr. Sowers; how was the remaining stock divided between you, Phillips and Herbert & Micou? A. Herbert and Micou took seventeen shares, Phillips twenty-two shares and I took ten shares.

Q. You have testified that Micou at that time paid $1200.00 in cash which you and Phillips got together with the overplus of General Reid's payment, explain why Micou paid $1200.00 in cash? A. According to our agreement Micou was to have one third of $10,000.00 in cash and his proportion according to this of what he should pay on that basis on the first payment on the amount he had subscribed for amounted to $1200.00.

Q. You have been shown a draft of General Reid payable to Micou for $1500.00 and asked if Micou's payment at that
283 time was not $1500.00; what is your recollection since seeing that draft? A. My recollection is that the $1500.00 draft or the proceeds therefrom were turned in and that Phillips returned $300.00 of this to Micou.

Q. Do you know on what terms that Micou got that $1500.00 from General Reid? A. I do not.

Q. Do you know whether it was a loan? A. It was a loan.

Q. How do you know it was a loan? A. I remember Micou gave General Reid a note for the $1500.00.

Q. When was the first assessment made to pay for this land and on what sum total same was made? A. $17,500.00.

Q. Was that assessment for $17,500.00 made before General Reid went to Guantanamo or after he got back? A. The assessment of $17,000.00 was made before General Reid went to Guantanamo and an assessment of $500.00 was made afterwards. Micou should have paid $3211.00 but he paid $1200.00.

Q. Why should he have paid $3211.00? A. This was his proportion of the assessment of $17,000.00.

Q. You were asked in cross-examination about the monies you have expended in this enterprise which have not been paid to you—have you kept any record of any such expenditures? A. Yes of most of them.

Q. Where is it? A. Checks and different records that I
284 found in my office.

Q. Have you made any payments of expenses of which you kept no record? A. I have.

Q. State what those expenditures were? A. My expenses to Washington in January, 1904, were at least $300.00.

Q. How long did you stay in Washington at that time? A. About two weeks.

Q. Do you mean to say that you went to Washington and stayed two weeks for $300.00? A. I spent more money than that in going to Washington and returning but part of this expense was charged up to the Colonial. I was there about two days on business for the Colonial, then I took up this matter.

Q. Well now if there is any other expenses you have been to of which you have no record, please tell us what it is? A. I went to Washington in May, 1904.

Q. How long did you remain that time? A. Four or five days.

Q. Do you know what your expenses was then? A. My expenses were at least $250.00 then.

Q. Is there any other expenditures of which you have no record? A. I paid $400.00 to Escalante.

285 Q. Have you any record of that? A. No.

Q. Is there any other expenditure of which you have no record? A. I have a record of most of the assessments I paid on my stock of the Company and can state that this amounts to about $1,250.00.

Q. Do you know what the books of the Company show in that respect? A. I do not.

Q. Well what other expenditures had you? A. I paid Abbott to go down to see the property before I made any deal on it and this must have been at least $50.00, and I have paid the $381.90 on the transfer tax for one of the deeds to which I have referred.

Q. Well, what else? A. And I paid $4,650.00 as my part of the assessment on the last payment on the land.

Q. Anything else? A. And I have an account against the Company for about $100.00 in which is included some expenses and the $54.63 on registration.

Q. Do any of these items that you have named include money paid to Micou for the purchase of his stock and the interest in the Escalante mortgage? A. No.

Q. Do any of them include money paid to Phillips for the purchase of his stock and interest in the Escalante mortgage?

286 A. No.

Q. Now having made that enumeration plain please point out which items you have records of and what they are? A. I have a record of the $54.63.

Q. What record have you of that? A. The receipt from the Registrar of Property and I think my check.

Q. I will ask you to produce that later. What other items have you a record of? A. The $4,650.00 on my last assessment. I have produced this receipt and it is an Exhibit to my deposition and I have a record of most of the assessments if not all made on this stock in the $1,250.00 estimate and I think I have a record of the $381.90 on the transfer tax.

Q. If you have the voucher for the Arellano transfer tax will you bring it and attach it as an Exhibit here? A. I will.

Q. You were asked in cross-examination about a conversation with Mr. Herbert about the 1st of April, 1906; I will ask you to give that conversation as fully as you can? A. I went to see Colonel Herbert with the idea of compromising this suit if it were possible to do so on any reasonable basis, because I did not have time to fool with it and he advised me to make a compromise stating he thought it would be a good idea. After talking
287 it over with him he told me to go and talk with Mr. Darlington as anything that I should say to either him or Mr Darlington in a conversation regarding a compromise could not be used as testimony in the suit and that Mr. Darlington was a gentleman and that I need have no fear of him. I then asked him if he had seen my answer to the petition and what he thought would be right. He said that he did not know but he did not think that General Reid would accept any proposition to sell his stock even at a profit.

Q. I will ask you if the proposition had been previously made to General Reid to buy his stock? A. It had.

Q. At what price? A. I offered to give General Reid $35,000.00 for his and Dr. Sowers' stock.

Q. Was that offer of a definite sum of $35,000.00 made before or after your talk with Colonel Herbert? A. After.

Q. Well go on with the conversation between you and Colonel Herbert? A. Colonel Herbert then asked me what the property had cost and I said it cost $20,000.00 plus about $2,500.00 that I estimated that I had paid in commissions and expenses connected with it and he said that according to that there was a profit
288 in the deal of at least $12,500.00 and I said there was at that time. He said, well then I think that you ought to settle because I believe they will win the suit against you and I told him that I did not think so and that I was not making a proposition to make a compromise because I would lose the suit but because I thought a compromise was always better than a law suit and was somewhat mystified at Colonel Herbert's conversation because some time before that Phillips sent me a copy of a letter which he said he had sent to Colonel Herbert telling him the facts about this matter and from his conversation it appeared that he either did not know what Micou had done in the matter in representation of the firm or that he did not care for me to know it and I then asked him to try to clear this matter up for me if he thought that good counsel and if he thought they could cancel the stock that I purchased from Micou and he said no that he thought not. He further stated that he was very anxious to see this matter settled and on the subsequent day we had another conversation. He said that he had talked to General Reid in which he told me that General Reid would not accept my proposition of $35,000.00 for his and Dr. Sowers' stock and he was afraid that he had shown too much interest in getting this matter settled, that is all that I recall
289 at the present.

Q. Did you ever make Runcie and Lamar an offer to pur-

chase this land or anything in the nature of an offer if so, state first, when it was and second just what the offer was? A. I remember that I went to see Mr. Runcie some few months ago, because a man had come into my office stating that he would like to buy their property or at least part of it and I went to see Mr. Runcie.

Q. By yourself? A. Yes.

Q. Well go on. A. I asked him what he would be willing to sell the property for. He said he would not sell some of it at all but that he would sell from one to three thousand acres at $12.50 an acre, and I asked him if he would give an option for thirty days at that price and he told me no, that he would not give an option.

Q. The question I forgot to ask you on direct examination—General Reid has testified that at a meeting of the Board of Directors of the Las Ovas Company in May, 1905, a Resolution was passed, authorizing an investigation of this matter and that in June, 1905, at another meeting of the Board of Directors a Resolution was passed authorizing the employment of Mr. Darlington and the bringing of this suit; I will ask you whether you received any notice
290 of the meeting in June? A. I did not.

Q. Did you receive any notice of the meeting in May? A. I did.

291 Recross-examination by Mr. RUNCIE:

Q. You have testified that Micou was entitled to one-third of $10,000.00; the testimony discloses that there was a margin of $15,000.00 profit in the deal between the price paid to Sra. Acosta and that paid by the Company; why was Micous participation limited to $10,000.00 of the $15,000.00? A. As I explained the contract drawn up by Micou himself provided for a third of $10,000.00 and this was the actual agreement in writing but in signing the deed finally it was agreed that Phillips and I would be allowed $3,000.00 for expenses and we were going to divide one-third of $12,000.00 with him.

Q. With whom? A. With Micou for Herbert & Micou.

Q. Did you ever make that division? A. The final settlement was never made because I bought their interest in the remaining mortgage—in the mortgage of $2500.00.

Q. And at the same time bought their share of the $2,000.00 of undivided profits? A. I cannot say whether I bought their share of the $2,000.00 profits or not. I bought eleven shares from Micou.

Q. Mr. Davis the division of the $15,000.00 profit has nothing whatever to do with the purchase or sale of shares. I am
292 trying to get a statement of what was done with the $15,000.00 profit which the testimony discloses, Micou, according to your own testimony on redirect-examination was limited to a participation of one-third of $10,000.00 out of the $15,000.00; and you state now that by a subsequent arrangement he, as representative of Herbert & Micou remained entitled to a participation of one-third of $2,000.00 more making the participation of Herbert & Micou one-third of $12,000.00 out of a total profit of $15,000.00 which you now state that at that time when you acquired the in-

terest of Herbert & Micou in the mortgage held by Escalante you also acquired their right to a share in the $2,000.00 of profit which had not been divided. A. I acquired their share in the $2500.00 mortgage which was necessary to make up their one-third of the $12,000.00 which they had not received.

Q. Now for what purposes were the remaining $3,000.00 of the $15,000.00 profit withheld by you and Phillips from the division made with Herbert & Micou?? A. This was allowed to us according to agreement for expenses.

Q. For what expenses—specify the expenses? A. It was not at that time specified; it was merely agreed that we should be allowed that $3,000.00 for the expenses we had incurred and might incur in connection with the deal.

293 Q. State all items of expenses incurred in the connection with the deal by you and Phillips which you consider to be covered by the $3,000.00 reserved? A. I do not just know what Phillips spent because he stayed in Washington some time after I left but as I stated my expenses up to that time were about $350.00. That is all that I remember.

Q. You stated that you paid $400.00 to Escalante; was that item supposed to be covered by this $3,000.00? A. It was not specified what should be covered by this $3,000.00.

Q. You have testified that you paid $400.00 to Escalante; do you regard that payment as covered by the $3,000.00 reserved for expenses? A. I never thought of it.

Q. Please think of it now? Do you now regard that item as one properly covered by the $3,000.00 reserved for the expenses of yourself and Phillips? A. I think not.

Q. You have testified that you paid Abbott $50.00 before closing the deal; was that item in your opinion covered by the $3,000.00 reserve? A. Yes sir I think so.

Q. Why did you go to Washington in 1904, in January? A. I went to attend a stockholders meeting of the Colonial Loan and Deposit Company.

294 HABANA, CUBA, *May* 7, 1906.

Whereas it does not clearly appear that Mr. Davis has rendered to the Company a final account of the monies received and disbursed by him as Manager of the Company's property in Cuba up to the time that he turned over the management to Messrs. Runcie & Lamar and to avoid the time necessary for Mr. Davis to investigate his accounts it is stipulated by Counsel that the records of the Company shall be taken as proof of this account. This stipulation is not to be considered as affecting in any way the question of the amount of monies contributed by the various parties in the organization of the Company.

Continuation of recross-examination by Mr. RUNCIE:

Q. You have testified have you not that the first division made of the profit of $15,000.00 was a division of $10,000.00 of that profit of which $10,000.00 you took one third, Phillips one third

and Micou took one third as representative of Herbert & Micou, is that right? A. No.

Q. Was such a division of $10,000.00 agreed upon and subsequently modified A. Yes sir.

Q. What modification was made? A. On the basis of $12,000.00 instead of $10,000.00.

Q. Then the $10,000.00 was divided into three equal shares which were taken by Micou, Phillips and yourself respectively, was it not? A. Yes sir.

295 Q. Why was that modification made? A. At the time of signing the deed Phillips and I told Micou that our expenses had not been as great as we had anticipated and that we were willing to divide on the basis of the $12,000.00 profit instead of the $10,000.00.

Q. How was the remaining $3,000.00 profit disposed of? A. This was included in all of the expenses which Phillips and I had in connection with this deal before and after.

Q. Was any allowance made out of that for the expenses of Micou? A. I think not; this was merely an advantage that we were given over Micou without specifying just what should be included in it.

Q. How much of the $3,000.00 did you receive? A. I received $1,000.00 in cash—I cannot answer that I do not know.

Q. Was the $3,000.00 equally divided between you and Phillips? A. As I remember it was not. It was I think estimated that Phillips had spent more money in connection with the matter up to that time than I had.

Q. Did Phillips make any statement to you of the expenses for which he was to be reimbursed out of this $3,000.00? A. I remember we talked the matter over but I do not remember of any statement being made except orally.

296 Q. So that there was a mere estimate of the expenses but no statement of expenses which were paid out of that fund of $3,000.00 for yourself and Phillips? A. As I remember in the settlement made by us, Phillips stated that his expenses had been so much and I stated that mine had been so much and at the time there was some money left over, but I do not remember the exact amount.

Q. But any money left over above the estimated expenses of Phillips and yourself was divided between you in some way was it not? A. Yes sir.

Q. That is you received an additional profit over and above your expenses out of that $3,000.00? A. Yes sir at that time.

Q. Now can you recall any items of your own expenses which were included in the estimate which you made at the time of the division between yourself and Phillips of the $3,000.00? A. I recall my expenses to Washington in January which amounted to $300.00 and as I remember I paid Abbott $50.00 and then I paid my part of an assessment of $1696.00, I think it was; that is all I remember.

Q. Was that assessment levied by the Company on its shareholders? A. At that time the Company had not been formed and it

merely an agreement between all of the parties interested in the deal.

Q. But the amount of the assessment was distributed among all who were to be shareholders of the Company was t? A. Yes sir.

. And do you regard that as an expense incident to the reali- n of your profit of $15,000.00? A. I do not remember how garded it at that time but I should not consider it so.

. Then do you think that that item is properly included under expenses which your considered to have been paid out of the 00.00 reserved from the profit? A. I considered that I had ht to spend this in any way.

. Can you state whether Phillips went to Washington in Janu- 1904, for any other business than that of promoting the deal the Las Ovas Company? A. He went to attend a meeting of stockholders of the Colonial Loan and Deposit Company also.

. He would have gone for that business if there had been no deal the Las Ovas Company would he not? A. Yes sir.

. Just as you did? A. Yes sir.

. Do you remember whether in your verbal discussion of the enses of yourself and Phillips he considered his expenses in going to and remaining in Washington as properly chargeable to this fund of $3,000.00? A. Not all of it.

Q. Were his expenses so chargeable greater than your ? A. Yes sir.

. For what reason? A. As I remember he stayed in Washing- at least a week after I left and probably longer than that.

. When you had the interview with Colonel Herbert about ch you have testified you told him that you had expended about 00.00 in commissions and disbursements which you thought ld be allowed to you; can you now state what items of commis- s and disbursements you consider included in that $2500.00? I did not state to Colonel Herbert that I thought that $2500.00 rred to should be allowed to me, but I did state that I had spent east $2500.00 in connection with the deal in commissions and enses.

. Do you mean by that you had spent $2500.00 out of the fund 3,000.00 which you had reserved to cover the expenses of yourself Phillips? A. No I was not considering any fund.

. Do you mean that you had expended $2500.00 in disburse- nts and commissions over and above what you considered as rgeable to the fund of $3,000.00? A. At the time I merely made an estimate to Colonel Herbert but in looking over the matter since I find that I had spent more money than I thought I had spent at the time and I did not consider what d this came from.

. What items did you consider when you made the estimate of 00.00 of disbursements and commissions of which you spoke to onel Herbert? A. As I stated I was merely speaking in general ns and tried to state it very conservatively. I have given an

estimate of all the money that I have spent in connection with this deal.

Q. Did the $2500.00 estimate which you made to Colonel Herbert include the same disbursements which you have testified were provided for by the $3,000 profit which you reserved? A. The estimates which I have given included the $2500.00 because I had spent more money in connection with the deal than I thought I had spent at the time I was talking with Colonel Herbert.

Q. What item or items of account did you refer to when you spoke of the amount of $2500.00 to Colonel Herbert? A. As I remember I had in mind at the time a commission of $600.00 which was paid to Roma Guerra which I did not remember had been charged to the Company and also $400.00 I paid to Escalante and in a general way other items which I had in connection with the deal.

300 Q. Had you not presented a partial account to the Company charging the Company with $600.00 commission paid to Roma Guerra? A. I had but I did not know it at that time.

Q. You had forgotten it then? A. Yes sir.

Q. Did you consider that the sum of $400.00 paid by you to Escalante should be allowed to you in any settlement that you might effect with the Company. A. No I considered that this was a cost to me connected with the purchase and sale of the property through Escalante.

Q. Was not that item properly chargeable against the profits which you realized out of the sale? A. Yes sir.

Q. Can you state any other items of commission which you consider included in that estimate of $2500.00? A. No.

Q. So that the only items or expenditures which you can recall amount to $1,000.00 of which $600.00 has been paid by the Company—is that not true? A. No; the only items of commission which I paid was the $600.00 and the $400.00 not counted in other expenses.

Q. Are not all of the other items provided for out of your $3,000.00 of reserve profit or else paid by the Company?

301 A. No.

Q. What expenses, if any, are not so provided for or so paid by the Company? A. The items of expenses which I gave Saturday.

Q. Do you mean that all the items of expenses which you gave Saturday were never chargeable to your profits nor paid by the Company. A. No.

Q. What items of all of those which you gave on Saturday are not properly chargeable to your profits and were not paid by the Company? A. Of the items given Saturday I find that I was mistaken about the $54.63 for the registration of the deeds because I have found a record of where this was paid by the Company to me in making a payment to Micou for my account?

Q. (Repeated.) What items of all of those which you gave on Saturday are not properly chargeable to your profits and were not paid by the Company? A. I have testified what I spent in connection with this deal which had not been charged against the

Company and I have also testified regarding the profit in same and I did not consider just what funds this was to come out of.

Q. What did you consider when you told Colonel Herbert that you had expended $2500.00 approximately which you thought should be allowed to you in the settlement then contemplated?

302 A. When I spoke to Colonel Herbert about the $2500.00 which I had spent in connection with the deal I was making at the time a general estimate of what I thought I had spent and was not considering any one special item—further, that as I remember I had in my mind at the time the commissions above referred to.

Q. When you make a general estimate do you not base it on the consideration of some data? A. Yes sir and in this my general recollection I estimated that my expenses had amounted to that much.

Q. And did you not recall that those expenses had been provided for out of the profit which you realized out of the deal? A. I knew that I had paid expenses out of my pocket and also on the deal.

Q. And you still desired to make those expenses the basis of an allowance to be made to you by the Company?

By Mr. PUTNAM: I object to the question because the witness has made no claim against the Company at all.

A. I have not tried to charge this against the Company but have merely tried to state all of the facts requested of me. I considered that I was entitled to the profit in this deal and being allowed that that I have got no charge against the Company.

By Mr. RUNCIE: Motion made to strike out the last statement of the witness as entirely irrelevant and not responsive to any question asked on recross-examination.

303 Q. You went to Colonel Herbert with a view to proposing a settlement of this suit, did you not? A. I did.

Q. Did you go on your own account or were you requested by Colonel Herbert? A. I went on my own account.

Q. And in the discussion of the terms of a proposed settlement you suggested that an allowance of $2500.00 should properly be made to you for your disbursements and commissions paid during the course of this deal, did you not? A. No.

Q. Did you ask Colonel Herbert whether such an allowance should not be allowed to you? A. I told Colonel Herbert that I would give $35,000 for General Reids and Dr. Sowers stock or that I would sell my stock for what it had actually cost me and that at that time I made an estimate of my expenses and the money I paid $2500.00 not counting assessments that I had paid on the stock purchased by me from Phillips and Micou. Colonel Herbert did not tell you all of it.

Q. Did you not then ask Colonel Herbert whether that sum so estimated by you at $2500.00 should not be allowed to you in any settlement? A. I think not.

Q. Haven't you testified to that effect? A. I have stated the facts regarding our conversation as I remember it.

304 Q. Do you mean that Colonel Herbert suggested that that amount be allowed you? A. No.

Q. Was any question raised as to the allowance of that amount? A. The $2500.00 as I have stated several times before was included in the estimate that I made as to what money I had put into the deal.

Q. For what purpose did you make any such estimate? A. Because we were considering a compromise.

Q. What relation had that estimate to any compromise which you were considering? A. I told Colonel Herbert that while I did not have any fears whatever about winning the suit that I would as a matter of business and to save time and expense rather compromise the matter. I then proposed to give $35,000.00 for the stock of General Reid and Dr. Sowers which was estimated would give them all of their money back and pay $5,000.00 to $7,000.00 profit or that if they did not wish to sell that I would sell my 49 shares of stock for what it had actually cost me and the item of $2,500.00 was mentioned as a part of the cost of that stock. There you have all the facts.

Q. That is the item of $2500.00 was to be allowed to you in estimating the cost of your stock and the price at which you were willing to sell it? A. No, I agreed to settle on the basis of being
305 allowed $2500.00 besides the assessments that I had paid on the stock and the money that I had paid for the stock purchased.

Q. Did you offer to account for your share of the profit of $15,000.00? A. Yes that would have accounted for it.

Q. And you now find that you included in the $2500.00 which you included in your expenses $600.00 which had been paid by the Company? A. The $2500.00 estimate was merely made in order to reach a settlement but as I remember when I mentioned the commissions I did have an idea that the $600.00 paid Roma Guerra had not been charged to the Company.

Q. You have testified that you made an offer for an undisclosed purchaser for a portion of the Company's lands at $12.50 per acre; what commission did you ask from the Company at that time? A. A commission of 10% of which I intended half for the Trust Company and the other half to the gentleman who proposed the business.

Q. Was that the real price that the purchaser offered $12.50 per acre. A. It was.

Q. Were you not informed that Runcie & Lamar would submit any proposition to the Board of Directors and be governed by their decision? A. I think so.

306 Q. And were you not informed that no option could be given by Runcie & Lamar unless authorized to do so by the Board of Directors? A. No I was told by Mr. Runcie that he had the power-of-attorney from the Company and he could do as he pleased, but that he would prefer to speak to the Board of Directors.

Q. Were you not informed at the time that Runcie & Lamar took their power-of-attorney from the Company on condition that the

Company should authorize in writing any exercise of that power which should incumber or dispose of the Company's lands? A. I do not remember that.

Q. When you bought Phillips and Micou's stock, were you not aware that that stock so far as it was of the assessable class of stock had been purchased by Micou and by Phillips out of their share of the $15,000.00 realized on the sale of the property to the Company? A. Yes sir.

NORMAN H. DAVIS.

307 REPUBLIC OF CUBA,
City of Habana:

I, the undersigned, Joseph A. Springer Commissioner, do certify that Norman H. Davis, the witness, personally appeared before me, at the office of the U. S. Consulate General at Habana, on the twenty-seventh day of April, 1906, at three o'clock in the afternoon and at eight o'clock in the evening; on the fifth of May, at four o'clock in the afternoon, and on the seventh of May, at four o'clock in the afternoon, and after having been first duly sworn to testify the truth, the whole truth and nothing but the truth, did depose unto the matters contained in the foregoing deposition, and did in my presence subscribe the same and endorsed the exhibits thereto.

And I further certify that I have subscribed my name to each half sheet thereof, and to each exhibit.

And I further certify, that James E. Runcie and J. J. Darlington appeared in behalf of the Complainant and Samuel A. Putman appeared in behalf of the Defendant.

JOSEPH A. SPRINGER,
Commissioner.

308 (N. B.—That portion of these letters marked in the margin with pencil lines are the parts that are in evidence. Mr. Putnam said he agreed that only these parts should be used.)

The seven letters following make up

DAVIS EXHIBIT No. 4.

WASHINGTON, D. C., *July* 15, 1904.

Mr. Norman H. Davis, care Colonial Loan and Deposit Co., Havana, Cuba.

MY DEAR DAVIS: Phillips started last night for Tennessee with the intention of going earnestly to work to sell orange groves. He is a great deal more sanguine than I am; but he is full of faith, has a contract with the Company which is binding for 90 days, and for another year thereafter provided he sells seventy-five groves of five acres each within ninety days. This was his own proposition. If within the next ninety days he sells seventy-five more groves the contract is binding for another year, and so on, as long as the Company is engaged in the business of selling orange groves. So far I do

not think that any groves have been actually disposed of, although Phillips has a good many promises from people who appear to want to buy.

Phillips is a little sore over the indisposition of the Company to provide for his expenses since he has been here, or a portion of them, and also funds to enable him to advance something to the agents at the outstart. I think, however, that the Company wants to see what Phillips can do before they go into anything like that, and that if he is successful even partially, as compared with what he expects, they will be disposed to render him any assistance that is within reason.

We made an assessment of ten dollars a share recently, but this has not all been paid in yet. Dr. Sowers paid his proportion,
309 I paid mine, and Phillips has left in my hands a draft for the payment of your and his proportion, the same being the difference between them and Mr. Mendoza's fee and the full assessment for you both—Phillips assuming Mr. Mendoza's fee of $400. He requested that I deposit this draft when they actually needed the funds, not sooner. Herbert and Micou have not paid up their assessment but Micou assures me that they will have the money now in a day or two. When they have paid their assessment I will deposit Phillips' draft, and that will give us the money to at once pay the interest ($437.00) for which I will send you a draft although Phillips advised that as you said you would draw the draft had better not be sent until you did so.

We also passed a resolution in the board of directors the other day to set apart 100 acres of land near the little lake for the company's use in planting orange groves and to authorize the Secretary and Treasurer to take steps to arrange with Thayer, or some reliable person or persons to begin planting 40 acres of these 100 when the proper season arrives. This was considered to be not only a safe investment for the company but expedient, as showing to those to whom we propose to sell orange groves that the company itself was doing precisely what they were asking other people to do, that is raising oranges as a business and for profit and besides that if any one should wish to buy groves already planted we could furnish them at once.

The trouble that we are likely to run up against in my opinion is funds. Some of the stockholders are beginning to have the idea that the sale of groves should supply the means of carrying on the business without resorting to the necessity of assessments upon such stockholders. Of course this would be very desirable if it could be done; but that is a matter still to be decided and in the event of its not being successful the $17,500 which will be due at the end
310 of a year on the purchase of the land has got to be paid, and the interest has got to be paid on the principle. Now, no individual or establishment on earth can survive long which is paying a high rate of interest unless the sales are something enormous, and therefore I think we have got to cast about and make arrangements to meet these demands when they become due in case the proceeds from sales should not be sufficient to pay for the land, pay the in-

terest when it falls due and to go on with the cultivation of our own 40 acres and such groves as Phillips may sell.

Phillips told me that we had been offered by some one in Cuba $35,000 for 2,000 acres of land. I asked him if he did not think in view of all the circumstances that it would be a good thing to accept such offer — it was still open and square up all debts and have our 3500 acres of land left for the purpose of planting and selling in the shape of orange trees, tobacco, pineapples, and whatever else might be desired. He thought not because he is so sanguine of selling groves that he wants to keep the whole and sell it out in groves. I think if we have had a genuine offer of $35,000 for 2,000 acres, that in view of all the circumstances it would not be a bad idea to accept. However you are there on the ground and you know better than I what would be best, and I would like your opinion on it. I should think that with all the land paid for and all debts squared up 3,000 acres of land clear on the investment would be anything else than bad. The accumulation of debts, high rates of interest and the like is not at all difficult, but the payment of such accumulation is often the reverse. I believe you have somewhat the same opinion. Of course three months is going to determine what Phillips can do in selling this land and if it should prove that he is mistaken in his idea steps will have at once to be taken to provide for the payment of our obligations

311 It will be a very difficult matter to raise money in this country on property in Cuba, although I believe that it will be a very safe investment to anybody to put up $17,500 and take a mortgage on the land as security. Still people here are very chary of Cuba until it has proved its business stability, and I do not know what steps we may have to take to raise the money if Phillips is not as successful as we wish in the matter of selling groves.

So far we have had a very pleasant summer here but there are very fair prospects of hot weather to come, and I am anxious to go north for a month where my family is at Gloucester, Mass. I think, however, I shall have to stay here until the first of the month, when Phillips expects to be back from Tennessee.

Please think things over and write me so that I may have your letter before Phillips returns, and then if it seems desirable I can have a talk with him about the matter.

With my kindest regards to Mrs. Davis and yourself, I am,

Sincerely yours,

(Sd.) GEO. C. REID.

P. S.—What are the prospects of leasing and what are the conditions under which we would lease? Do you think that you will be able to lease enough of the tobacco land to furnish any considerable revenue? I think that perhaps if the Company was willing to put up money to help these fellows who want to begin growing tobacco there we might lease a good deal of it; but I am inclined to think it will be difficult to persuade the stockholders to advance much until they see something coming in by the sale of groves. I do not like much this business of being Treasurer. If you find a good opportunity to sell let me know please. Perhaps you may know

some one who wants to buy part or all of my interest, if so let me know.

312 WASHINGTON, D. C., *November* 2, 1904.

Mr. Norman H. Davis, care Colonial Company, Prado 110 B, Havana, Cuba.

MY DEAR DAVIS: Your letter of the 18th ultimo notifying me that you would draw on the Company for $375 was duly received, as was also your letter of the 20th ultimo. I paid the draft for $375 as soon as notified by the bank. On Thursday last the members of the board of directors met here in the office and authorized me to make an assesment of $9.00 per share on the stockholders of the Las Ovas Company to meet obligations incurred and those which would be necessarily incurred during the coming month. On November 1st at a meeting of the board held at the office of Herbert & Micou they reconsidered their previous action and authorized an assessment of $6.00 per share instead of $9.00 per share; and letters to that effect have been mailed to all the stockholders.

Nothing has been heard from Phillips as to whether Mr. Thomasson has gone to investigate our proposition.

The directors are getting a little bit restless under the necessity for repeated assessments without any income, and if the sale of these groves that Phillips writes us that he has contracted for, and enough others to give reasonable encouragement to continue the project is not concluded I think the Company will abandon the idea of selling groves altogether and take up the question of leasing and selling the land.

The directors have again called on me for a detailed statement of all moneys received and all moneys expended with vouch-
313 ers for the latter. They also wish to have the contracts or leases for any lands leased by you in order that they may know the terms and consitions thereof and to have them entered in the records of the Company.

In your letter of the 20th you referred to a dividing of the mortgage on the Las Ovas property that renders necessary the payment of $375 interest to Senora Ana Acosta and $62.50 to Mr. Escalante. The directors do not understand that there is any mortgage upon the property, and if there is how could it be so subdivided. Won't you please explain this matter to us? The Company understands, of course, that we are to pay interest on the $17,500 remaining due on the property and that this should be paid by the Company to the person from whom we purchased, but as paying any portion of that to a person unknown in the purchase would still leave the Company liable for the same to the person from whom we actually purchased.—

The company has also again reminded me that I have no receipt in my accounts for the Mendoza fee of $400. I will be much obliged to you if you will get me Mr. Mendoza's receipt, and send it to me.

By the way Davis, while I think of it, I find on going over the figures that you figured the payment for the 1000 acres of the lake property on the basis of 90 shares instead of 150 as was agreed, and

as is noted in your memorandum; and in this way I paid $194.44 instead of $166.65; Phillips paid $122.22 instead of $123.32; Herbert & Micou $94.44 instead of $106.65; you paid $55.56 instead of $83.37, and yourself for Billings $33.33 instead of $19.99. You know that it was understood that that thousand acres should be paid for by yourself and Phillips, Herbert and Micou myself and Billings as 150 shares; I wish you would look into this matter and see if I am correct.

314 In your letter you mention a tax of $10.68 on the land. The Company want me to explain that as they understood that there was no tax on land in Cuba. Also please send on the deeds of transfer, as the Company desire to see them.

The members of the board do not understand fully what the censo on our land means. Micou explained the matter as Mendoza explained it to him, but I think you had better send us a written explanation of exactly its nature and to what extent it might affect our title. I told the board that I thought this was the tithes customary to be paid to the Catholic Churches in Cuba as was formerly done in the United States, and I found on consulting with the Rev. Father Dougherty of the Georgetown College that such is the case, and he tells me that he thinks we would have no difficulty, if we went about it properly, getting the good offices of some prominent official in the church here, in having this thing removed. I will therefore take steps to do this. Can you find from anyone there just how the removal of this claim can be effected and let me know? In your letter of the 20th also you state that you have collected $132.45 rent in advance and have expended $135.68. The memorandum of leases which you sent to Mr. Herbert shows $212 advance rent. The board therefore decided not to include in the assessment authorized the amount necessary to meet your bill of $135.68, and the balance of the $400 to Jose Arellano for notary's fees until we have heard further from you in regard to the matter.

Now, Davis, it seems to me that there is coming to pass exactly what I mentioned when I last wrote you: that is that the grove selling proposition is likely to prove a failure, and that we shall at once have to take steps to provide for the payment of the balance that is due on the land, and at the same time take the neces-

315 sary steps to put matters into such condition as will enable the land to bring in an income at least sufficient to pay its own expenses. Of course if Phillips is successful with these men whose agent goes to Cuba it will be an encouraging start in the matter of selling groves, and I think if it showed a good prospect of a satisfactory beginning the Company would be perfectly willing to push such proposition in every way they might be able to. They do not like the idea of selling a few groves, and having the thing taken up only in a small way. They consider that it would be a detriment to the value of the land in the market to have somebody own a patch or patches here and there or even in any one locality of the whole tract, and unless they can see where they are going to sell groves enough to make it an object I very much doubt if they

will be willing to follow up that proposition. Now, my idea is that we can sell probably a thousand acres at a good price and pay off all indebtedness and then go to work on what we have left either cultivating it for ourselves or leasing it with a view to holding the same for the next three, four or five years, and I do not doubt that we shall be able to realize a big profit on our investment; for there is little doubt in my mind but what Cuba within the next four or five years will become a territory of the United States, and if so the value of such lands as we hold will incerase ten fold over or even more than that.

By the way, some discussion was had during the last meeting of the directors in regard to your methods of doing business. For instance it was thought that instead of your paying the rent and the other bills against the Company down there, and applying such payments on your assessments, the bills should be sent here and paid by the Treasurer's check and receipted for to him, and that each member should pay in the actual amount of his assessment, as
316 any other way of managing the matter simply confuses the accounts, and makes them unintelligible except to those personally connected with the transaction. This way would also avoid the necessity of drawing on the Company here, which causes us sometimes to have to hustle, in order to prevent the draft going to protest.

I as much regret the poor success that has attended the attempt to sell groves as Phillips does, or any other member of the Company, but as you well know I never had much confidence in the proposition. I should like to see groves enough sold to pay for the land at any rate, but I am very much afraid that it will be sometime before that could be done; although Phillips says that if the report of the representative who was to go to Cuba to investigate the matter is favorable, he thinks he can sell a great number of groves in Tennessee and Georgia alone in a very short time. I hope it may turn out so.

We yesterday vacated our rooms in the Colorado Building, and have taken quarters temporarily in the Kimball Building for the transaction of business until we can hear further from Phillips and see whether it will be of any use to continue an office here in Washington.

I regret that you were unable to come on here when you were in the States, as I think you could have helped matters very much. However, I hope that you or Phillips may be able to come up here soon.

I trust that you and Mrs. Davis are both well and that if I do not see you here before that time I shall see you in Havana in December.

With kindest regards to Mrs. Davis and yourself, I am,

Sincerely yours,

(not signed)
Sec'y and Treasurer.

317 P. S.—I finish my 64 years the 15th of December when I retire from active duty, and will then be free to go when and where I please.

P. P. S.—The new address of the Company is Suite 20, Kimball Bld., 1417 G St. N. W.

318 WASHINGTON, D. C., *Feb.* 8, 1905.

Mr. Norman H. Davis, Prado 110 B, Havana, Cuba.

MY DEAR DAVIS: Gillett writes me that he mailed a letter to me to the Colonial Company's office. Won't you please have this forwarded to me right away? Also Mr. Arellano writes me in his estimate of the cost of registering our deed he did not take into account the $7.00 fine for not having registered the same within 80 days from the date of the deed. Also that he had to pay about $10 more to the Registrar than his estimate of $25.00. Won't you please pay this to Arellano and send me a receipt and I will send you a check for the money, or if I come down next month pay it to you. What I want is to get it squared up.

I have also an incomeplete paper which you found in overhauling your desk for the deeds and gave it to me. This paper appears to be a full description or account of the censos on our property and I believe a full explanation of our title. This paper seems to be a carbon duplicate, and I suppose is a copy of the paper which Mendoza says he made out and gave to some of you—probably the one mentioned in his letter to Phillips as being enclosed for Micou. The pages of the one I have are numbered blank, 2, 3, 4 and 5. In the lower left hand corner of page 5, which is the end of the paper, are the phrases typewritten in Spanish:

"Honorarios veinte y cinco.
"Ldo. Gregario de Llano-
"Pesos cincuenta centavos"
"Nos. 9 y 10 Arl. . . . . ."

319 The beginning of the paper is: "Quinto & & & que copiada a la letra dice; cuarta censo"..... etc.

Won't you please see if you can find the other pages belonging to this statement and send them to me as soon as possible. If you cannot find them can't you have your typewriter make a copy from the books of either Arellano or Mendoza, whoever got up the paper?

The next item of interest I have to mention is the last assessment of $12 per share. Won't you please send your apportionment along? as we have but about a dollar and a half in bank. I have paid up mine and the Company still owes me about $250. Herbert has paid up his and Dr. Sowers his. It took $1.50 more to pay Herbert up than his assessment amounted to; so we really so far have only had $72.00 the amount of Sowers' assessment. I do not intend to advance any more than is absolutely necessary until I am squared up with the Company; so send in your assessment as soon as possible. So far I have not heard anything from Ricks or Parker, and am anxious to hear whether you have seen them.

I hope you will if you have not already done so have Phillips

send me the receipt I mentioned in my letter with the other trifling matter spoken of in the same communication.

We are having a long seige of very cold weather and Mrs. Reid and I are anxious to get back to Cuba. By the way you may also get Mendoza's bill for $60 and send that to me. Whether we will want to retain him will depend upon where the money is coming from to pay him which is a matter that we must decide also; but the directors want that I should get in his bill so that we may know of every dollar that we have to provide for paying.

Now, Davis, please attend to these matters right away and let me see how prompt you can be when you try.

320 Hoping you find Mrs. Davis and the children well, and with kindest regards to you both from Mrs. Reid, Mrs. Gilliland, Mrs. Hines and myself, I am,

Sincerely yours,

(S'd) GEO. C. REID,
Sec'y and Treas.

321 WASHINGTON, D. C., *April* 5, 1905.

Mr. Norman H. Davis, care Company Colonial, Prado 110 B, Havana, Cuba.

MY DEAR DAVIS: I reached here all right on Sunday morning after a rough and tumble passage in the little Mascot from Havana to Tampa. There were only four people on board including myself and the Captain who were not sea sick.

I enclose you a memorandum which shows that you made a mistake in your figuring of the amount due from the different stockholders on account of the last payment for the land. As you will observe the payment for the land should be based on 90 shares and the payment for the interest on 150 shares whereas you figured the entire payment on 90 shares. This makes the difference between what you gave me and what was due $26.44. I deposited your check and Dr. Sowers' to the credit of the Company and have credited the payment of my own share $9666. and some cents to the Company endorsing all these payments on the back of the note which the company gave me on my return for the $18000 that I deposited.

I wish you would send me the receipt that I gave you for the $4650 as being in full and I will send you a receipt for the $4650 as on account, or if you wish I will pay the $26.44 for you and give you a receipt in full, applying that amount on what I owe you.

We have not received the papers in regard to the Thomas Norton-Las Ovas One thousand acre land deal yet but as soon as they come I will bring the matter before the Company as also the question of taking Tarafa's farm off his hands.

I found Mrs. Reid and Conrad well and full of inquiries
321½ after Mrs. Davis and yourself and everything about Havana and Vedado. To-morrow Mrs. Reid and I are going to market to see if we can get some nice apples for Mrs. Davis. By the way I had a letter from Bradford this morning saying that the U. S. S. Topeka had brought the cigars all right from Guantanamo

to Pensacola and as he had orders to send the Topeka north before the 15th of April he would leave the box on board of her to be sent to me from whatever port she arrived at in the United States, so my anxiety on that account is very much relieved, as will also be the case with you and Levy. I will send you a check for the $269 and some cents as soon as I get my Las Ovas accounts in and squared up. I have been advancing the running expenses of the company for some time past and now that the land is all paid for I want to get everything squared up. I find a number of people here who want to go into the tobacco business, and to whom I will make a definite proposition as soon as our friend Lienhoff turns up here for further consultation.

I had a letter from Ricks who says that he won't be able to pay up his assessment and wants that you and I should take his shares off his hands. This we cannot do without the consent of the board of directors as he is already delinquent in payment to the company but I will bring it up before the Company at the next meeting, giving the rest of the stockholders a chance to go in with us in buying these shares if they want to. I have not heard anything from Dr. Adams who wanted to get in on the "ground floor."

With kindest regards from Mrs. Reid and myself to Mrs. Davis and yourself, and to Phillips and Mrs. Phillips, I am,

Sincerely yours,

(S'd) GEO. C. REID.

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1631 MASS. AVE. N. W.,
WASHINGTON, D. C., *June* 17, 1905.

Mr. Norman H. Davis, 110 B Prado, Havana, Cuba.

MY DEAR DAVIS: I am in receipt of your- of the 12th instant and I am glad to hear *the* you are coming up here in July.

The assessment of $25 per share was made necessary by Ricks and Parker failing to pay their share of what was due on the land. If they had paid up we would not have been obliged to make this assessment. I was anxious to get in the entire assessment so as to be able to square up everything and go away for the summer as I cannot see the necessity for keeping the office open for the next three months. I have moved the furniture up to my house so as to save the rent, and the office is now at 1631 Mass. Ave.

I got my cigars from Levy about a week ago but he failed to send me both the 500 you got for me from Las Ovas and the thirteen or fourteen hundred Sanborn got for me in Artemesia, although he told me positively when I was in Havana last March that those cigars were packed in the box he had sent on to Guantanamo. I would be much obliged if you would speak to Levy about this for me, as he must have them still and if he has got them I wish he would take them off my hands as I do not care to lose both the cigars and the money also.

We are having exceedingly hot weather here even worse than it is in Havana and I am anxious to get away. With kindest regards from Mrs. Reid and myself to Mrs. Davis and yourself, I am,

Sincerely yours,

(S'd) GEO. C. REID.

323 1417 G Street N. W.,
Washington, D. C., *Dec.* 22, 1904.

Mr. Norman H. Davis, 110 Prado B, Havana, Cuba.

My Dear Davis: Yours of the 12th instant enclosing letter from Mr. Arellano received. This matter of Arellano's bill has been up for consideration two or three times before the board of directors and day before yesterday I brought the subject up again.

Mr. Herbert having received a letter from Mr. Phillips saying that he expected to leave on the evening of the 12th for Cuba the board directed me among other things to write to Phillips and ask him while in Havana to pay to Arellano the sum of $224 which is the amount of assessment due the company from Phillips and which together with the check for $76 that I sent you will pay Arellano's bill. The directors decline to make an assessment to cover this bill of Arellano's so long as the necessary amount therefor is due from Phillips to the company, and he being at present in Havana where he could easily pay the amount and square up his account. I sincerely hope that Phillips for his own sake will attend to the matter.

You will have received probably by this time my telegram of to-day to Phillips notifying him that the board of directors has abandoned the matter of selling orange groves.

In July last we received *we received* through Phillips from J. P. Heck 60 notes of $25 each; C. S. Lippincott 60 notes of $25 each; R. J. Hall 6 notes of $50 and 48 of $25 each; and F. P. Davenport 57 notes of $25 each on account of the purchase of groves from the Las Ovas Company. No contracts for these groves were received or submitted to the company and nothing has ever been paid on any of

324 the notes although the drawors thereof were duly notified as the notes became due.

The latest reports from Phillips were to the effect that upon the return of the delegate sent to Cuba to report upon your proposition for the sale of groves if such report should be favorable he expected to sell a large number of groves. Your letter without date but last prior to the one of December 12th tells us that the delegate's report would be very favorable, but we have never received the report nor have we heard except indirectly through a newspaper article that the representative from Chattanooga gave a favorable opinion upon his return from the trip to the Las Ovas tract. Some three or four days ago Mr. Herbert received a letter from Phillips saying: "I enclose, etc., 5 applications for groves, 3 on the $600 down basis and 2 on the $25 instalment plan." There were however but 3 applications in the letter and in neither of these was there mention made of whether they were for the $25 a month plan of purchase or for the $600 down plan and the blank spaces wherein the amounts to be paid down should have been entered were struck through with a pen.

Mr. Herbert also received information from Phillips that he (Phillips) expected to start on the evening of the day the letter was written for Cuba he having been called there by urgent business.

On the 10th of October last there was a meeting of the board of directors at which it was resolved that the contract with Phillips as

agent for the sale of groves having expired on the failure of Phillips to sell 75 groves by October 1st, as stipulated in said contract, the directors without renewing said contract, but leaving entirely open the question of future agency for the sale of the groves "Authorize and empower Chas. T. Phillips to make as many contracts as he may for the sale of groves said contracts to be completed by Nov. 1, 1904, and the commissions and other terms of sale not herein modified to be the same as heretofore agreed upon, subject to the approval of the Board of directors."

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It was at this meeting that the board agreed to pay the expenses of the representative to visit Cuba and report upon our proposition. It was also provided in the action of the board that there should be at least 10 subscribers for groves upon the basis of $600 per grove paid down, said subscribers binding themselves to take the groves subscribed for if their delegate should report a statement of the facts made by the company in the prospectus as true and the Company able to carry out its proposition as made to them.

At a subsequent meeting of the board the president was requested to call upon Phillips to report for confirmation or other action of the directors any sales of groves he may have negotiated or might negotiate during the month of November.

At a meeting on the 12th of November the President was instructed to request Phillips that upon the return from Cuba of the representative of the people who had conditionally subscribed for 10 groves if the report of said representative should be favorable, to proceed with and complete such sales according to the terms of payment heretofore mentioned and the same with regard to any other contracts Phillips might have made in the meantime or might make by December 1st for sales based upon the $600 payment down plan.

Of all these things Phillips was duly informed by President Herbert, I believe.

In view of the foregoing and the fact that the drawors of the notes for the purchase of the four groves first mentioned have failed to honor said notes when due and that there was no contract accompanying the sales of these groves: That the three applications recently received were unaccompanied by contracts and failed to stipulate any amount to be paid down: And the further fact that so far as now appears to the directors we have failed to make actual sale of a single grove: And as the time for meeting our obligations for the payment of the balance due on the property and other necessary expenses by April 1st, is rapidly approaching its limit the directors have concluded that it would be folly to further rely upon the grove selling scheme to meet these demands and have therefore concluded to abandon the scheme entirely and take other steps at once to provide the means of meeting the coming obligations referred to.

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I am sorry on the company's account and sorry for Phillips that he has been unable to carry out a project in which he seemed to be so completely wrapped up.

We have on hand a scheme for the sale of 1000 acres of our lands

at $50 an acre and with, I think a fair prospect of carrying it through, and if we are able to do this we can pull through without much trouble: But if not then we might as well just face the music and make our calculations to raise the money to pay for the land and to pay our legitimate bills by assessments upon the stock.

With this in view the President has been requested by the directors to call a meeting of the stockholders here in Washington at the earliest practicable moment. I enclose you a copy of the resolutions adopted by the board at their last meeting and as said before I have telegraphed Phillips that the Company has abandoned the scheme of selling land for orange groves.

Now, Davis, my idea is that we should take up the matter of cultivating a portion of our land ourselves. I think we could put out from 20 to 30 or more acres of tobacco and 100 acres or more of pineapples on our own account, then lease as much of our land as we may be able by the year and take up in another form the scheme of selling the lands. I believe that by forming small colonies
327 we can sell as much of that land within the next year as we may care to sell. At any rate we have got to do something.

I expect to go down to Cuba before very long but will give you due notice in order that you may get me some place to live outside of a hotel that charges $12 a day gold for a single room.

I wish that you would write up to that fellow who made the cigars for Micou and me when we were in Las Ovas and see if you cannot get me a thousand or two cigars at the same price we paid before. I want them made of the best tobacco, but I do not care about bands and wrappers and filagree work.

I retired from active service on the 15th as a brigadier general but it took a slice of about $1200 a year off my pay all the same. It is getting dark and I can't see to draw this out much longer.

Please drop me a line as soon as you receive this and tell me what you think.

With kindest regards to yourself and Mrs. Davis and wishing you both a merry Christmas and a happy New Year, I am,

Sincerely yours,

(Not signed.)
Sec'y and Treas.

P. S.—Won't you please find out for what the Hotel Trocha will give me two good rooms and board for myself, wife and a lady friend per week? I wish you if you can would let me know this just as soon as possible because if I can get my matters out in Ohio attended to I may want to come down to Havana any time after New Year. I suppose prices at the hotels in town are away up as usual, and as I shall want to stay with my wife and her lady friend about two weeks I want something comfortable but reasonable.

327½ About the cigars mentioned above: I would like them about the size of an "Invincible" or those that Phillips used to get from Levy and not too strong—say part Colorado and Maduro. They used to make a first rate cigar called the "Planta-

tion" and put up in corn husks. I would like it if I could get some cigars made from the very best tobacco grown on our own plantation to distribute them here in a moderate way, to show what we can do in the way of tobacco.

(Sd.) GEO. C. REID,
Sec'y and Treas.

328 Mr. Norman H. Davis, Vice-President Las Ovas Company, Havana, Cuba.

MY DEAR DAVIS: We have had two meetings of the board of directors within the past two weeks at the first of which we telegraphed Phillips to come on here in regard to the contract with him for selling groves and the business of the Company generally. Phillips wrote that he could not come on account of business connected with the selling of groves and of meeting you. Mr. Herbert then wrote Phillips sending a copy of his letter to you and asking that you both come on to which letter you both replied.

We had a meeting of the stockholders last Monday at which a resolution was passed declaring the contract with Phillips terminated by the fact the he had not sold the groves as stipulated in said contract, but in view of what Phillips had written to the effect that he then had an agreement with certain persons to take ten groves if we would pay the expense of one to be selected by them to go to Cuba to investigate our statements and proposition and if his report confirmed our statements they should sign for the groves. Mr. Herbert was authorized to write Phillips that though the contract with him was terminated for the reason stated, yet if he could sell 10 or more groves on the conditions stated in his letter the company would pay the expenses of that representative (not to exceed $150) but providing that if the agent reported favorably the purchasers were to pay $600 down per grove that Phillips could go ahead on these conditions, and that the matter of a new contract or the renewal of the old one would be matter for the future consideration of the directors.

The fact is, Davis, the directors have not been satisfied with the way matters have gone. They expected by this time to have something coming in, but instead it has only been outlay. The
329 assessments already made have been expended and I am paying the running expenses of the office out of my own pocket (the company to reimburse me later). Phillips was so sanguine of selling the 75 groves within 90 days that his failure to consummate the sale of any has undoubtedly a discouraging effect on the directors as to our method of selling groves and particularly as they have to stand a still further assessment. My own notion would be to assess enough to go ahead with at least 200 acres of groves on our account, to employ a good overseer and plant at least 50 acres in tobacco and 100 acres in pineapples.

I believe the land is going to be much more valuable than it is now and that we should cultivate it and put it in shape to bring in a good income until we see fit to sell it in orange groves or otherwise and I am ready and willing to stand my share of the cost of doing this.

The directors at the last meeting inquired of me what you have done in regard to leasing portions of the land as no contracts for the same have been received. Also what rents have been collected for this year's and last year's leases. I wish you would send me as soon as possible a statement of these matters in detail, that I may lay the same before the directors as requested. Likewise please send me Mendoza's receipt or acknowledgment for his fee that I may complete my books and present them to the committee for audit.

I am sorry that Phillips has had the bad luck that he has and hope that he may be able to still make sale of a good number of groves. My own idea has always been that if we had groves bearing we could sell them much more readily than we can sell land to grow them. The directors are anxious to get your statement that they may have some idea of what to expect from leasing and
330 I wish you would give us a few points as to how much tobacco per acre such land may be expected to produce and the value of the same in market, the proportion of tobacco to go to the lessor, etc. Also please send copies of leases. I received a day or two ago a letter from Capt. Thayer in which he states in effect that to plant less than 100 acres he would have to charge $175 per acre. I think he would have better stood by the former price, *i. e.*, $150 per acre and that it would be well for you to see if you can't get other competent persons to bid for the work.

I am sorry that you did not come on her- to the meeting of the directors even though Phillips did not come. There was a good deal that the directors wanted to talk about with you, and I believe that you could have done much good by coming.

I think also Davis that you had better write me a full explanation regarding the censo on the Las Ovas tract as only Micou and I know anything about it and I want to explain it to the directors besides I may be able to get the necessary church assistance here to get the thing removed. When we come to explain our title as we may have to do at any time it will be necessary to know all about this.

In your reply to this please tell us what you have done in regard to having the land transferred from Micou as trustee to the Company. This the directors wish to know.

I think I had better stop now as by the time you have gone over all this you will be fairly well exhausted.

Please remember me most kindly to Mrs. Davis and believe me,

Sincerely yours,

(Sd.) GEO. C. REID,
Sec'y and Treas.

P. S.—I expect to come to Havana in December and with
331 me Mrs. Reid, Dr. and Mrs. Sowers and maybe some others.

At the execution of a commission for the examination of witnesses between "Las Ovas Company *vs.* Norman H. Davis, *et al* defendant, this Exhibit marked and numbered, "Davis, Exhibit No. 4," and comprising seven letters, dated respectively, July 15th; Nov'r 2 Dec'r 22, of 1904, and Feb'y 8, April 5th, June 17th, of 1905, and

one other, date torn off but apparently of 1904, was produced and shown to the witness Norman H. Davis, and by him deposed unto and subscribed by him at the time of his examination before me;

NORMAN H. DAVIS.

JOSEPH A. SPRINGER,
Commissioner.

332 DAVIS EXHIBIT NO. 5.

Subscription to Stock.

It is hereby agreed, That Charles T. Phillips and Norman H. Davis of Havana, Cuba, and George C. Reid and Hilary A. Herbert and Benjamin Micou of Washington, D. C., under the firm name of Herbert & Micou, having purchased a tract of land in Cuba containing some 6000 acres more or less, being in the northern part of the estate known as Las Ovas and in the Province of Pinar del Rio of Cuba; that the said parties in consideration of their personal services rendered in the matter of examining this land and arranging for the purchase of the same, and also in consideration of planning and organizing this corporation for the purpose of developing this land, are to receive 40% of the minimum capital stock of $150,000 of the Company, or sixty thousand ($60,000) dollars thereof—said stock to go to them as the promoters of said Company; and the services having been rendered, stock is to be received by them as fully paid up, and to be divided among them as follows:

George C. Reid will have $15,000 of this stock,
Messrs. Herbert & Micou will have $15,000 of this stock,
Charles T. Phillips will have $15,000 of this stock
Norman H. Davis will have $15,000 of this stock.

333 And they hereby subscribe for said promoters' stock upon the terms and conditions above set forth.

(Signed) CHAS. T. PHILLIPS.
NORMAN H. DAVIS.
HERBERT & MICOU.

As to the remaining $90,000 worth of this minimum capital stock, we, the undersigned, subscribe for the same upon the following conditions, *i. e.* each subscriber paying for the proportional part according to the stock subscribed for by him necessary to make the first payment upon the tract of land above mentioned in Cuba known as the northern part of the Las Ovas estate in the Province of Pinar del Rio, and hereby further agreeing to pay his proportional share according to the amount of stock subscribed for, if necessary, of $17,500, with interest, being the amount still due on the land, within one year from March, 1904; also obligating himself to pay, as the directors may call on him for the same, his proportional share of the $5000 expense fund, according to the proportion of the $150,000 stock subscribed for or received by him, said $5000 to be used as an expense fund at the order of the Directors. The shares of stock

to be issued to each subscriber upon the payment of his pro-
334 portion of the amount necessary to meet the first payment on this land and his proportion of the amount due to date to meet his payment to the expense fund.

(Signed) CHAS. T. PHILLIPS, 22 Shares.
NORMAN H. DAVIS, 16 Shares.
HERBERT & MICOU, 17 Shares.

At the execution of a commission for the examination of witnesses between The "Las Ovas Company" *vs.* Norman H. Davis *et al.*, Defendant-, this Exhibit marked and numbered "Davis Exhibit No. 5," was produced and shown to the witness, Norman H. Davis, and by him deposed unto and subscribed by him at the time of his examination, before me;

NORMAN H. DAVIS.

JOSEPH A. SPRINGER,
Commissioner.

[Endorsed:] Subscription to stock. Las Ovas Company Matter. Davis Exhibit No. 5.

335 DAVIS EXHIBIT No. 6.

FEB. 21, 1905.

Col. George C. Reid, Secretary and Treasurer Las Ovas Co., 1717 G Street N. W., Washington, D. C.

DEAR SIR: In reply to your favor of the 13th I will say that I had only received $62.50 as interest for the first quarter until the other day when Mr. Davis paid me $125 as interest for two more quarters thus paying me up until December 25, 1904.

Yours truly,
(Sd.) G. E. ESCALANTE.

At the execution of a commission for the examination of witnesses between "The Las Ovas Company" *vs.* Norman H. Davis *et al.*, Defendant-, this exhibit marked and numbered "Davis Exhibit No. 6," was produced and shown to the witness Norman H. Davis, and by him deposed unto and subscribed by him at the time of his examination, before me;

NORMAN H. DAVIS.

JOSEPH A. SPRINGER,
Commissioner.

336 DAVIS EXHIBIT No. 7.

B. N. dec.
No. 12971.
Habana.

Banco National de Cuba.

6611[15] am. cy. HABANA, *March* 19, 1904.

At sight of this first of exchange and second unpaid pay to the order of Benj. Micou Six Thousand Six Hundred 11 & 15/100 Dollars. Value received and charge to account of

GEO. C. REID.

Guardian Trust Co., Cleveland, Ohio.

Paid April 1, 1904, The Guardian Trust Co., Cleveland.

On the reverse side of this exhibit there appear the following endorsements:

Benj. Micou.
Chas. T. Phillips.

Pay to the order of Messrs. J. P. Morgan & Co.
Banco National de Cuba.
National Bank of Cuba, Havana, Cuba.

Pay National City Bank of New York or order.
J. P. Morgan & Co.

Pay any bank or banker or order.
Prior endorsements guaranteed.
May 30, 1904.
National City Bank of New York, H. M. Kilborn, Cashier.

Paid.
Bank of Commerce.

(The words in the original where this blank occurs are illegible.)

337 At the execution of a commission for the examination of witnesses between "Las Ovas Company" *vs.* Norman H. Davis, *et al.*, Defendant-, this Exhibit marked and numbered "Davis Exhibit No. 7," and hereto annexed, was produced and shown to the witness, Norman H. Davis, and by him deposed unto and subscribed by him at the time of his examination, before me;

NORMAN H. DAVIS.

JOSEPH A. SPRINGER,
Commissioner.

338 DAVIS EXHIBIT No. 8.

No. 66. WASHINGTON, D. C., *March* 19, 1904.

The Washington Loan and Trust Company,
Cash capital $1,000,000.

B. N. dec.
No. 12792.
Habana.

Pay to the order of Benjamin Micou $1500 Fifteen Hundred Dollars, and charge the same to the account of book No. —.

GEO. C. REID.

(Loaned to Micou in connection with the Cuban land purchase.)

Paid Mar. 31, 1904.

On the reverse side of this exhibit are the following endorsements:

Benjamin Micou.
Benj. Micou.
Chas. T. Phillips.

The Riggs National Bank,
Prior endorsements guaranteed,
Mar. 31, 1904,
Washington, D. C.

Pay to the order of Messrs. J. P. Morgan & Co.
Banco National, Cuba.
National Bank of Cuba, Havana, Cuba.

Pay National City Bank of New York or order.
J. P. Morgan & Co.

Pay any bank or banker or order.
Prior endorsements guaranteed.
May 30, 1904.
National City Bank of New York, H. M. Kilborn, Cashier.

A lead pencil memorandum on the back of this exhibit is as follows:

Loaned Micou to pay his share of first payment on 5,000 acres.

At the execution of a commission for the examination of witnesses, between The "Las Ovas" Company *vs.* Norman H. Davis, *et al.*, Defendant-, this Exhibit marked and numbered "Davis, Exhibit No. 8," and hereto annexed, was produced and shown to the witness, Norman H. Davis, and by him deposed unto and subscribed by him at the time of his examination, before me;

NORMAN H. DAVIS.

JOSEPH A. SPRINGER,
Commissioner.

339 DAVIS EXHIBIT No. 9.

$565.33. WASHINGTON, D. C., *May* 13, 1904.

Received of Col. Geo. C. Reid the sum of Five Hundred 65 & 33/100 Dollars, value received, this being his proportionate share of $1696 as expenses advanced by Charles T. Phillips and myself for the Las Ovas Company Incorporated.

NORMAN H. DAVIS.

At the execution of a commission for the examination of witnesses between The Las Ovas Company *vs.* Norman H. Davis *et al.*, Defendant-, this Exhibit marked and numbered "Davis Exhibit No. 9" was produced and shown to the witness, Mr. Norman H. Davis and by him deposed unto and subscribed by him at the time of this examination, before me;

NORMAN H. DAVIS.

JOSEPH A. SPRINGER,
Commissioner.

340 DAVIS EXHIBIT No. 10.

HABANA, *May* 2, '05.

Gen. Geo. C. Reid, Secretary and Treas. The Las Ovas Company, Washington, D. C.

DEAR SIR: Please pay to Benjamin Micou $179.63, being the amount I have advanced for the Company on the following items: $125 interest to G. E. Escalante and $54.63 amount paid to the Register of Property for registering deeds of Company. The rest of my account with the Company can be left pending, which amounts to very little.

Sincerely, NORMAN H. DAVIS.

At the execution of a commission for the examination of witnesses between The Las Ovas Company *vs.* Norman H. Davis, *et al.*, defendant-, this exhibit marked and numbered "Davis Exhibit 10," was produced and shown to the witness, Mr. Norman H. Davis, and by him deposed unto and subscribed by him at the time of his examination, before me;

NORMAN H. DAVIS.

JOSEPH A. SPRINGER,
Commissioner.

341 DAVIS EXHIBIT No. 11.

This agreement entered into by and between the Las Ovas Company Incorporated, party of the first part, and Charles T. Phillips, party of the second part; witnesseth: The party of the first part agrees that the party of the second part as general manager of the company for the party of the first part shall have full

charge of the employment and appointment of agents to sell lands owned by the party of the first part in the Province of Pinar del Rio, Cuba for citrus fruit culture and to secure contracts for the Company to plant the same in citrus fruits, and for his services in this connection he is to receive a commission of 5% on all lands sold and contracts for planting secured through him or his agents or otherwise, said commission of 5% to be paid as follows: If the contracts are placed at $25 per month at the 5 acre unit for $1500 then the first third and sixth months' payments shall go to him in payment of his commission. If the first payments up to $600 are in larger sums than $25 per month he shall receive his commission as follows: $25 out of the first $25 coming into the Company, another $25 at such time as $75 have come into the Company, and the third payment at such time as $150 shall have come into the Company.

All agents, their remuneration, expenses and commissions are to be paid by the party of the second part, and the party of the first part is in no wise to be liable for the remuneration, acts or representations of the agents of the party of the second part.

If the party of the second part at the end of 90 days from the date of this contract has not secured as many as 75 contracts for land and groves combined at the 5 acre unit, then the party of the first part has the privilege of cancelling this contract. If the party of the second part has secured 75 contracts for land and groves combined at the 5 acre unit at the end of 90 days from the date of this contract,
342 then this contract to remain in force and effect for one year from that date, and if at the end of that year the party of the second part has secured 75 more contracts for lands and groves combined at the 5 acre unit then this contract shall be renewed for another year. This contract to be renewed for a year at the end of each year that as many as 75 contracts for land and groves combined, at the 5 acre unit have been secured by the party of the second part.

It is further agreed that if prices are advanced on the sale of land and groves combined this contract shall still apply. That the party of the second part shall on the terms herein stated be entitled to 5% on the price at which such contracts may be made the commission payable out of payments received in the same proportion and out of the same monthly payments as herein provided for in contemplating the placing of contracts for land and groves combined at the five acre unit at $1500. This contract is terminable at any time the party of the first part may discontinue the making of contracts for the sale of land and citrus fruits combined upon giving 90 days' notice to the party of the second part.

THE LAS OVAS COMPANY, INCORPORATED,
By GEO. C. REID,
Secretary and Treasurer.

CHAS. T. PHILLIPS.

At the execution of a commission for the examination of witnesses between The Las Ovas Company and Norman H. Davis *et al.*, Defendant-, this exhibit marked and numbered "Davis Exhibit No. 11," was produced and shown to the witness, and by him deposed unto and subscribed by him at the time of his examination before me;

NORMAN H. DAVIS.

JOSEPH A. SPRINGER,
Commissioner.

343 DAVIS EXHIBIT NO. 12.

HABANA, *December* 12, 1904.

Col. Geo. C. Reid, Secretary and Treasurer of Las Ovas Co., Washington.

MY DEAR COLONEL REID: Enclosed you will please find a letter from Mr. Arellano, the Notary, acknowledging receipt of the check for $76, which I delivered to him at your request.

As you will see from this letter this matter is getting very embarrassing for me, and I have held it off all of this time on account of my personal credit with Mr. Arellano.

Please see that this is paid at once even if we have to make another assessment.

Yours very truly,

NORMAN H. DAVIS.

344 HAVANA, *December* 12, 1904.

Mr. Norman H. Davis, City.

DEAR SIR: I acknowledge receipt of the cheque drawn by "The Las Ovas Company" in my name for $76 (seventy six dollars) which I receive on account of the $400 (four hundred dollars) that said Company owes for the three deeds I have executed for the same.

I did not wish to receive said cheque on account and I have accepted it only at your request.

My opinion is that the Company has not been fair with me. The first two deeds were executed on last March, and I did not receive a cent of my fees but about six months later when they paid on account ($100) one hundred dollars and they did so probably because they obtained a reduction of my fees.

Please oblige me by writing to the Company that I should like my bill to be settled, before the end of this year.

Yours respectfully,

JOSE RAMIEREZ ARALLANO.

At the execution of a commission for the examination of witnesses between The Las Ovas Company *versus* Norman H. Davis *et al.*, Defendant, this exhibit marked and numbered Davis Exhibit No. 12, was produced and shown to the witness Norman H. Davis, and by

him deposed unto and subscribed by him at the time of his examination, before me.

NORMAN H. DAVIS.

JOSEPH A. SPRINGER,
Commissioner.

345 DAVIS EXHIBIT No. 13.

WASHINGTON, D. C., *January* 26, 1905.

Hon. H. A. Herbert, Pres. of the Las Ovas Company Incorporated, Washington, D. C.

DEAR SIR: Having this day sold all of my stock in the Las Ovas Company to Gen. G. C. Reid and Norman H. Davis I hereby tender my resignation as director and general manager, to take effect at once.

Yours very truly,

CHAS. T. PHILLIPS.

At the execution of a commission for the examination of witnesses between The Las Ovas Company *versus* Norman H. Davis *et al.*, Defendant, this exhibit marked and numbered "Davis-Exhibit No. 13," was produced and shown to the witness Norman H. Davis, and by him deposed unto and subscribed by him at the time of his examination, before me.

NORMAN H. DAVIS.

JOSEPH A. SPRINGER,
Commissioner.

346 *Testimony on Behalf of the Defendants.*

Filed October 10, 1906.

In the Supreme Court of the District of Columbia.

In Equity. No. 25622.

LAS OVAS COMPANY, INCORPORATED, Complainant,

vs.

NORMAN H. DAVIS and CHARLES T. PHILLIPS, Defendants.

WASHINGTON, D. C., *Friday, October* 5, 1906—3 o'clock p. m.

Met pursuant to agreement of counsel at the office of Percy E. Budlong, Columbian Building, Washington, D. C.

Present on behalf of the complainant, J. J. Darlington, Esq.

Present on behalf of the defendants, Samuel A. Putnam, Esq., and J. K. M. Norton, Esq.

Present, also, George C. Reid, Esq., and the Examiner, Percy E. Budlong.

CHARLES T. PHILLIPS, one of the defendants, a witness of lawful age, called by and on behalf of the defendants, having been first duly sworn, testified as follows:

By Mr. PUTNAM:

Q. You are one of the defendants in this case? A. Yes,
347 sir.

Q. What is your present residence? A. I am in the real estate business in Atlanta, Georgia.

Q. Have you read the bill filed in this case by the Las Ovas Company? A. Yes; I read it some time ago. I have not read it since.

Q. If you had an option on any part of the property known as Las Ovas in the province of Pinar del Rio, Cuba, state when you got that option, and the circumstances attending it. A. Just exactly when I cannot say, except as to the month. It was when Mr. Micou was in Cuba the first time. I think it was either the last of December or in January; somewhere along there. It was either December, 1903, or January, 1904; I cannot just exactly be particular as to the date. Mr. Tarafa had been in our office off and on for a month previous to that, offering this property to us; and we had conditionally agreed to take 4,000 acres, the first one that we looked at, for $10,000.

Q. Do you mean that you had agreed to take the land, or an option on the land? A. An option on the land.

Mr. DARLINGTON: One moment; I object to leading questions.
The WITNESS: We had agreed to take an option on the land.

By Mr. PUTNAM:

348 Q. Whom do you mean by "we"? A. Mr. Davis and myself.

Q. Go ahead. A. And I saw, by the paper, that Mr. Micou was in town. I remembered having known him in Washington several years before; and we called on him at his hotel. In the course of the conversation Micou stated that he had owned an orange grove in Florida——

Mr. DARLINGTON: I object to any testimony as to conversations with Mr. Micou.
Mr. PUTNAM: I do not care for that.

The WITNESS: I met Micou and introduced him to Davis. The question of buying land in Cuba came up, for the purpose of planting oranges. Micou said that he would like to go into a proposition of that sort; and then he further stated that if we had a good piece of land, he would go in with us. Either Davis or myself described the Las Ovas tract to him, which interested him, and he said he had some friends in Washington whom he thought he could interest in the business. That was the beginning of the Las Ovas deal. We told him we would be in Washington in January, so it must have been the last of December. No; it might have been along the 1st of January or the last of December of 1903 that this conversation

occurred. Then we came to Washington; and that was the beginning of our deal with General Reid and the Las Ovas Company.

Q. Did you agree, at that time, to give Micou, or the firm of Herbert & Micou, any interest in the option?

Mr. DARLINGTON: I object to this as immaterial and inadmissible as to any issue in this case, and as incompetent as against the complainants in this case, or any part of them.

349 A. I could not positively state that we did at that time or that we did not. He was to go in the deal with us to buy the land. The idea at that time simply was that we were to buy the property, as it was too much for any one of us to handle individually, and to get other people to buy with us.

Q. You say after that you came to Washington? A. We came to Washington; Yes, sir.

Q. Did you see Micou after you came here? A. Yes, sir.

Q. Did he introduce anyone to you as probable purchasers of that property? A. He introduced Captain Billings and General Reid.

Q. Where did you meet them? A. I met Billings at the New Willard first, and I think I met the General in Herbert & Micou's office.

Q. What took place between you and General Reid at the time you met him? A. We met daily after that right along for a considerable length of time. The formation of this Company was brought up then; in fact, it might have been brought up prior to that time. Micou may have discussed that with us prior to our meeting General Reid, but I do not believe he did. Wait a minute; he did discuss it prior to that time. We did discuss the formation of the Company, and putting the land in to the Company at $25,000; and we met General Reid and talked over a proposition on that line, to buy the 4,000 acres for $25,000 and to form a stock company.

Q. Was anything said to Micou in Cuba about forming a
350 stock company? A. I do not think that it was mentioned in Cuba at all. In fact, I am sure, or reasonably sure, that it was not.

Q. When you took the option, did you take it for the purpose of forming a stock company? A. We took it for the purpose of disposing of the land at a profit, whether by means of a stock company or otherwise.

Q. Did you ever offer the land to any one except to General Reid? A. Mr. Billings, and some gentleman, a clerk in one of the departments—the chief of one of the departments here. His name I have absolutely forgotten.

Q. At what price did you offer it? A. We offered it to all of them at the same price—$25,000. There was never any other price discussed.

Q. Then the proposition was made by some one to make a corporation? A. Yes.

Mr. DARLINGTON: One moment; I object. The witness has testified that the project of forming a corporation originated before he met Colonel Reid.

Mr. PUTNAM: I did not so understand him. I will leave it to the witness.

Mr. DARLINGTON: You will find it so. He told you it was possibly before, and then he said it was, positively.

The WITNESS: The proposition of forming a stock company—yes; I had testified to that. I testified that Micou and myself
351 and Davis had discussed that just prior to our talking with General Reid.

By Mr. PUTNAM:

Q. Did those negotiations result in the agreement to form a stock company? A. Yes; they did result in an agreement to form a stock company, and a paper was signed to that effect, if I remember right.

Q. I hand you a paper marked "Complainant's Exhibit No. 2," and ask you if that is the agreement to which you refer? A. (After examining paper.) I think it is, sir.

Q. I see that the name of Herbert & Micou is not signed to this paper. Did they agree to it or not? A. It should have been signed by them. I did not notice that. I feel reasonably sure it was signed in the ones we had.

Q. How about Billings? A. If I remember right, Billings signed.

Q. Were there any other persons parties to that contract except Davis, Herbert & Micou, Reid, Billings and yourself? A. No, sir.

Q. How long did you and Davis stay here after the signing of this contract? A. I should say twelve days or thirteen days—something of that sort. We made a trip over to Richmond, Virginia; Governor Willard's name was mentioned—for the purpose of seeing if we could interest him. I had forgotten that.

352 Q. Where did you and Davis go then? A. I think I came back here, if I remember right, and Davis went to Cuba.

Q. How long was it before you went to Cuba? A. A short time after that. Davis went back before I did; I went back shortly afterwards.

Q. If General Reid and Micou then came to Cuba, state about when that was. A. I should say that that was somewhere about the 1st of February. It was only a short time after we were here; probably two or three weeks after.

Q. For what purpose did they come to Cuba? A. For the purpose of purchasing this $25,000 tract of land.

Q. Did you see them when they got there? A. Yes, sir.

Q. Did you go with them to inspect the property? A. No, sir.

Q. Do you know whether they went or not? A. I know that they left in the morning, and they came back the next day, I think it was (or I may be off a day or so in that) and said they had seen the land. In fact, Davis came over to my house and told me that the only trouble there seemed to be——

Mr. DARLINGTON: I object to what he stated.

By Mr. PUTNAM:

Q. Do you know a man named Howard who works on the Adam Gray plantation? A. No, sir.

353 Q. Did you ever know him? A. I never knew him that I can remember of. I never knew him and I never saw him.

Q. Do you know whether he went with General Reid and Mr. Davis to see this Las Ovas property? A. I have heard that he did, from the people who went.

Q. Did you hear General Reid say any such thing as that? A. I heard General Reid say so; yes, sir.

Q. After the return of General Reid and Davis and Micou from the inspection of the property, what negotiations occurred then? A. Well, Davis came to my house.

Q. Do not tell anything Davis said unless General Reid was there. A. Then I will leave out a good deal about Davis. I saw Davis and Micou both before General Reid.

Q. Go on, then, and state what conversation you had when General Reid was present. A. The General thought that he ought to have a participation in the promoters' stock.

Q. I will call your attention first to this fact: Was any proposition made to increase the amount of land to be bought? A. Yes.

Q. What was that? A. That we were to increase it by a purchase of $9,000 more of property.

354 Q. Was that purchase of $9,000 agreed upon? A. To the best of my recollection, if it was not agreed upon that night, it was the next day.

Q. It was finally agreed on, was it? A. Yes.

Q. Did you or Davis make any profit on that additional purchase of $9,000? A. No, sir; I did not, and I do not think Davis did.

Q. Do you mean to say by that that the owner of the property, the Widow Tarafa, was to be paid the $9,000 increase? A. She was to be paid the $9,000 increase.

Q. While we are on it, I will ask you whether she was paid the $9,000 increase, eventually? A. Yes, sir; that is, if the mortgage that was on the property was taken up, as I understand it was.

Q. You say General Reid thought he ought to have an interest in the promoters' stock? A. Yes, sir.

Q. Tell just how that was and what was done about it. A. I will have to go back a little to that last question, in order to do that. Davis came to my house and said——

Mr. DARLINGTON: I object.

Mr. PUTNAM (To the witness:) Do not tell about what Davis said; just state what General Reid said.

Mr. DARLINGTON: Mr. Phillips, in order to save time, only state what happened when General Reid was around.

Mr. PUTNAM: Unless I want him to tell about Micou. For the present, just tell what happened when General Reid was
355 present.

The WITNESS: Well, the General said that while he was perfectly willing for Colonel Herbert to have an interest in the promoters' stock on account of his name and reputation, he did not think that Micou deserved to have any more or any advantage over him at all in the transaction; that he was perfectly willing for Colonel Herbert to have a legitimate proportion of promoters' stock,

on account of his name, but that he did not regard Mr. Micou as a necessary essential, or that he did not consider that he should have anything more than he had in it.

By Mr. PUTNAM:

Q. Did he demand a participation in the promoters' stock? A. Yes, sir; he said if Micou had it he must have it, and he would not go into it without he did have it.

Q. What reply did you all make to that? A. I think that I told him that for my part, I was willing for him to have an equal participation with Micou.

Q. How about Davis? A. Davis agreed to the same thing.

Q. And how about Micou? A. And Micou agreed the next day; but Micou did not agree that night. He said he thought that he had done the work, and that he was a smarter man than the General, and would do more for the benefit of the concern; and that he had other friends back here in Washington, other people who could put the deal through, and for us to just drop the General. I told
356 Davis that I thought Micou overrated his ability to handle other people; that the General was there, and that it was business to close the deal; and the two of us finally persuaded Micou to agree.

Q. Did you agree that General Reid should have a participation? A. Yes, sir.

Q. In the promoters' stock? A. In the promoters' stock.

Q. Had the Company been organized at that time? A. No, sir.

Q. After the agreement was made as you have outlined, was it reduced to writing? A. Yes, sir.

Q. I will hand you a paper marked "Davis Exhibit No. 2," and ask you if that is the agreement reduced to writing? A. (After examining paper:) Yes.

Q. What was done towards completing the deal after this last agreement I have shown you was signed? A. It was agreed among us all that the property should be taken in Mr. Micou's name, to be by him transferred to a company when formed. General Reid went to Guantanamo, I believe—a naval station somewhere in Cuba—and the next day, or the day after, we had a meeting of Davis, myself, the Widow Tarafa and her son Mendoza, and their lawyer—I forgot his name; Leopold Lesolas's partner.

Q. Was Micou there? A. I do not remember.

Q. Go ahead, then, and tell what occurred. A. Wait—I
357 think he was there for a short time; but as the conversation was mostly in Spanish, I do not think he remained.

Q. Tell us what was done at that meeting. A. The question of this $9,000 raise in the purchase was discussed, and she offered to put in the lake property for $3,000. No—then the censos were discovered by Mr. Mendoza. She offered to put in her lake property for $3,000, and then, in reading the papers, the censos were noticed and discussed; and she reduced the price of the lake property $2,000, making it $1,000 in consideration of those censos. Davis and myself closed the agreement, agreeing with each other that in case General

Reid objected to the addition of this property in this form, we would take it ourselves for the $1,000. Mr. Micou agreed with us that it was well worth the purchase, and also expressed himself as willing to do the same thing when we talked with him about it.

Q. Was the deed signed then? A. I think it was signed the next day or the day after.

Q. I will ask you whether you or Davis made any profit on that purchase of $1,000. A. Not a cent.

Q. When did General Reid return from Guantanamo? A. Some time afterwards; I could not say definitely. I suppose it might have been ten days, or something of that sort—a week or ten days.

Q. What was done about informing him of this additional purchase of what you call the lake property for $1,000 and of
358 the censos? A. He was informed of it. I cannot remember just when, but we all talked the whole thing over in my office. I remember that.

Q. Did you ever tell him about the censos? A. I explained to him that the reason why we got it for $1,000, if I remember, was on account of the censos.

Q. What did he do about the increased purchase? Did he reject it or accept it? A. He accepted it. In fact, I remember telling the General that I would go in with him and buy it; I would rather have it as a side issue, a personal matter; but he thought we had better put it in the Company.

Q. Had Micou gone home when General Reid came back to Havana? A. I think he had.

Q. What became of Billings, who you say was a party to the contract made in January here in Washington? A. Billings was apparently to some of them *persona non grata*, and it had been decided that if he did not take his stock, Davis would, or that we would pro rate it among ourselves.

Q. What did become of that stock? It was six shares, was it not? A. Six shares. I think it was sold to Dr. Sowers.

Q. Did you ever tell General Reid the amount of your option for the 4,000 acres as described in the first contract I have shown you, Complainant's Exhibit No. 2, 4,000 acres for $25,000? Did you ever tell General Reid what was to — paid to Mrs. Tarafa for
359 that property? A. No, sir.

Q. Did General Reid ever ask you what was to be paid for it? A. No, sir.

Q. Did you ever have any conversation with him on the subject of what your payment to Mrs. Tarafa was to be or had been for that property? A. After the formation of the Company, while I was in Washington, I had a conversation with General Reid in the Riggs House bar or cafe.

Q. What was that conversation? A. The General stated to me: "I don't know what you fellows make, or whether we will come up anywhere near expectations; but if I get my money out with a good profit of six per cent. or more, I am thoroughly satisfied."

Q. He did not know what you were making out of it? A. That is, if I remember right, he did not care what we had made out of

it or what we would make out of the deal. He said: "I don't care what you all make out of the deal, if I get my money with six per cent."

Q. About when was that conversation? A. That was about—well, while we were getting the offices ready.

Q. Fix the date as near as you can, Mr. Phillips. The company, I think, was organized in May. A. That must have been along about June—June 4th or 5th; somewhere along there.

Q. Did you ever tell General Reid or Micou or Herbert or Dr. Sowers that that option that you first had on the property
360 provided for the payment of $25,000 to the Widow Tarafa?
A. It provided for the payment of the land—that was all we told them.

Q. Did you ever tell any one of those parties what the land cost you?

Mr. DARLINGTON: I object. The testimony in this case shows without dispute that the land never cost the witness anything.

A. Not that I remember.

By Mr. PUTNAM:

Q. I will ask you what the land was to cost you.

Mr. DARLINGTON: I object to that as being vague and indefinite, fixing no time, and nothing in the testimony shows that it ever was to cost the witness anything.

A. Well, it has.

By Mr. PUTNAM:

Q. I will ask the question in another form. Did you ever tell General Reid or Dr. Sowers what that option provided should be paid to the Widow Tarafa for the property—prior to this suit, I mean? A. No.

Q. Did either of them ask you? A. No, sir.

Q. After General Reid's return from Guantanamo and his return to Washington from Havana, where did you see him next? A. I saw him in Washington.

Q. When was that, as near as you can give it? A. Along about the last of May or the first of June.

361 Q. Why were you in Washington at that time? A. To organize the Company; to put it in motion.

Q. Was Davis here at that time? A. I am not sure.

Q. When the Company was organized, after you came here, did you enter into a contract with them for any purpose? If so, state what it was. A. Yes; I entered into a contract with them for the sale of the groves, to receive a certain commission for my work.

Q. I will hand you paper marked "Davis Exhibit No. 11," and ask you what it is. A. That is the contract between the Las Ovas Company and myself.

Q. Did you perform any service under that contract?

Mr. DARLINGTON: Objected to as being irrelevant to any issue in this case.

A. I did.

Q. What did you do?

Mr. DARLINGTON: The same objection.

A. I devoted my whole time and attention until December to it, and spent a great deal of money.

Q. What did you do, specifically, between the time of signing that contract, and December, you say? A. For two weeks I waited here to meet Mr. Gillette, at the request of the Board of Directors of the Company.

Mr. DARLINGTON: I renew my objection, and suggest to counsel that this is very obviously a useless expenditure of time and money.

What Mr. Phillips did under this contract is not an issue in
362 this case, nor referred to in the pleadings as an issue.

The WITNESS: And afterwards, after Mr. Gillette was here, I went to Memphis and spent about four weeks there. I went to Canton, Mississippi, and returned. I went to Nashville and spent four to six weeks there. At Tullahoma and Lynchburg, Tennessee, I spent between three and four weeks, and altogether about six weeks in Chattanooga.

By Mr. PUTNAM:

Q. Who paid the expenses of that? A. I did.

Q. Do you know how much expenses you paid? A. I should say the total would be between $3,000 and $3,500.

Q. Were you ever repaid any of the expenses that you incurred for that? A. No, sir.

Q. Did you sell any orange groves? A. I sold some in Memphis, for which contracts were afterwards rescinded.

Q. By whom? A. By the company and by the individuals.

Q. Were you paid any compensation for your services? A. No, sir.

Q. Do you know what your individual expenditures were in the organization of the Company? I will explain to the witness that I do not mean any money he paid into the treasury of the Company, but money expended in getting up the company. A. Trips
363 to Washington and other things——

Mr. DARLINGTON: Objected to as irrelevant to any issue in this case, and objected to further because, if competent at all, moneys paid by the witness into the Company should not be excluded.

The WITNESS: Between Davis and myself—we divided the expenses half and half up to that time—I should say fully $2500 to $3,000.

Mr. DARLINGTON: The objection is renewed.

By Mr. PUTNAM:

Q. When did your connection with the Company under this contract I have shown you—Davis Exhibit No. 11—cease? A. I am not very positive, but I thing in December I was notified.

Q. Are you a stockholder in the Company now? A. No, sir.

Q. When did you dispose of your stock? A. I disposed of my

ock, the last of it—I disposed of a portion of it to General Reid, nd a portion of it to Mr. Davis at the same time.

Q. Do you know about when that was? A. General Reid's check me I suppose he has; all the checks seem to be there, and that will ow.

Q. He has not got that. A. It was about January 4th or 5th.

Q. Of what year? A. 1905.

Q. Then if you had any stock left after that, what has become of it? Who is the owner of it now? A. Mr. Davis; I sold it to him recently.

(At this point, by request, the stenographer read aloud the following question and answer:)

"Q. When did you dispose of your stock? A. I disposed of my tock, the last of it—I disposed of a portion of it to General Reid, nd a portion of it to Mr. Davis at the same time."

The WITNESS: I should have said there, "the last of it recently." did say it; probably the stenographer did not hear it—the last of t recently.

By Mr. PUTNAM:

Q. You disposed of the last of it recently to whom? A. To Davis.

Q. When you and Davis took this option from the Widow Tarafa (I mean the first option—that of December, 1903, or January, 1904) ad you formed any definite plan then as to the manner in which ou would dispose of it? A. No, sir.

Q. After you came to Washington and entered into the contract hich has been shown to you as Complainant's Exhibit No. 2, did ou enter into a contract with Micou as to the manner in which he as to participate as between you and Davis. A. Let me see that Exhibit No. 2, to be sure. (After examining paper:) Verbally, efore; in writing, afterwards.

Q. I will hand you a paper marked "Davis Exhibit No. 1" and sk you what it is. A. It is the agreement between Micou, Davis and nyself, signed in Richmond, Virginia, when we went over to see Governor Willard.

Q. In whose handwriting? A. Micou's.

Q. Who wrote it, actually? A. Micou proposed and wrote it.

Q. Who is the "Herbert" whose name is signed here as "Herbert Micou"? A. Mr. Micou's partner.

Q. What is your experience and knowledge as to the value of lands in Cuba?

Mr. DARLINGTON: Objected to as immaterial and irrelevant to any issue in this case.

A. In what section?

Q. In Pinar del Rio, the section in which this Las Ovas property is situated.

Mr. DARLINGTON: I object to each question and answer for the same reasons.

A. At the present time, lands along there are selling——

Q. That is not the question. The question is, what is your experience as to them? What do you know about them?

Mr. DARLINGTON: Objected to for the same reasons.

A. I know that they have more than doubled in value.

Q. Have you ever dealt in lands or had occasion to know the value of lands in that section of Cuba?

Mr. DARLINGTON: Objected to for the same reasons.

A. I have made loans on properties in that section of Cuba, and I have handled properties in that section.

Q. For how long?

Mr. DARLINGTON: Objected to for the same reasons.

366 A. For five years—nearer six years.

Q. Did you know the value of such property as that in February and March, 1904?

Mr. DARLINGTON: The objection is renewed.

A. Yes, sir.

Q. What do you consider was the value of the property purchased from the Widow Tarafa and deeded to Micou as you have described at the time it was so purchased and deeded?

Mr. DARLINGTON: Objected to for the same reasons.

A. Other properties not so good were selling, wholesale, at twelve dollars an acre.

Q. What do you consider this property to have been worth at that time?

Mr. DARLINGTON: Objected to for the same reasons.

A. At a very low valuation, $40,000.

Q. What do you consider that property to be worth now?

Mr. DARLINGTON: Objected to for the same reasons.

A. Sold as a whole, $65,000 to $70,000. Sold in lots, $40 to $70 an acre. That statement will be borne out by any real estate man in Cuba who knows land, I think.

Mr. DARLINGTON: Objected to for the same reasons, if the opinions of real estate dealers in Cuba are desired, their testimony must be given direct, and not through the medium of this witness.

Q. Mr. Phillips, in this entire transaction, so long as you were in it, I will ask you whether you ever made any misrepresentation of facts to any of the parties concerned in it?

Mr. DARLINGTON: Are you talking about this transaction
367 or some other transaction?

Mr. PUTNAM: The transaction growing out of the purchase of the land from Mrs. Tarafa, and the final organization and deeding of it to the Las Ovas Company.

A. No, sir.

Cross-examination.

By Mr. DARLINGTON:

Q. We understand, Mr. Phillips, that in your dealings with these parties whom you invited to go into the purchase with you, you told them the truth, the whole truth and nothing but the truth; did you? A. I answered truthfully every question that was asked me.

(At the request of Mr. Darlington, the Examiner read aloud the last question.)

A. I answered truthfully every question that was asked me.

Q. Do you decline to answer the question as I give it to you? A. No, sir; I will answer it.

Q. Then I ask you, again: In inviting General Reid and Mr. Billings to go into this transaction with you, did you tell them the whole truth about it and explain it to them so that they would understand the whole transaction? A. As far as their connection with it was to be; yes.

Q. What do you mean by that? A. I mean the price at which they were to be admitted with us in the transaction.

368 Q. Admitted by whom? A. By us. We had the option.

Q. And whom do you mean by "us"? A. Davis and myself.

Q. Did you explain to General Reid or Mr. Sowers that you and Davis were admitting them into the purchase at a higher price than the owner of the property was to receive for it? A. I never saw or traded or had anything to do with Dr. Sowers prior to the formation of the Company.

Q. How about General Reid? A. I told General Reid that the property would cost the Company $25,000.

Q. Did you tell General Reid that he was to participate in its purchase at a larger price than the owner of the property was to receive for it? A. No, sir.

Q. Why not? A. It was none of his business.

Q. Why was it not his business? A. Because I was selling him the property.

Q. Did you tell him that you were selling him the property? A. Did I tell him I was selling him the property?

Q. Yes. A. I certainly told him that he could come in at that price.

Q. Oh, Mr. Phillips, please answer the question. Did you tell General Reid that you and Davis were selling him the prop-

369 erty? A. I told General Reid that Mr. Davis and myself had an option on the property; that we would place it in the Company for $25,000.

Q. Did you tell him that that was $15,000 more than the option price? A. I did not.

Q. Why not? A. Because, as I answered previously, it was none of his business.

Q. Did you consider that the man who was to purchase thirty-five-ninetieths of the cash shares of the Company had no business to know

what the land was costing? A. He knew what the land was costing him.

Q. That is not the question, Mr. Phillips. Did you consider that the man who was to purchase thirty-five of the ninety shares which were to be paid for in money had no business to know what the land was being bought for, or the price which was to be paid for it to the vendor? A. I consider that the price had been made to the Company for that property; and if he did not wish to pay that price, he should not have put his money up in the purchase of the shares of stock.

Q. I am not asking you for your opinion of what course General Reid should have pursued. I am asking you whether you told General Reid that this property was being put into the Company for $25,000 when the vendor was selling it for $10,000. A. I beg leave to differ with you. You asked me whether I considered that
370 General Reid had a right to know what we paid for the property.

Q. And you have not answered the question, Mr. Phillips, very directly. I am now trying to put it in a way that will not admit of any evasion. I will ask the Examiner to read the last question.

(The Examiner read as follows:)

"Q. I am not asking you for your opinion of what course General Reid should have pursued. I am asking you whether you told General Reid that this property was being put into the Company for $25,000 when the vendor was selling it for $10,000." A. I did not tell General Reid what price Mrs. Tarafa was receiving for the property—the vendor.

By Mr. DARLINGTON:

Q. Whose property was this at the time Complainant's Exhibit No. 2 was executed—namely, in January, 1904? A. The agreement that we signed in Washington here?

Q. Yes. Whose property was it then? A. Ours, if we chose to exercise our right of option.

Q. Mr. Phillips, are you unwilling to answer these questions? A. No, sir; it was Mrs. Tarafa's——

Mr. NORTON: The form of the question is objected to. The witness has shown no disposition not to answer questions.

The WITNESS (continuing): Until we had paid the purchase price named in the option.

By Mr. DARLINGTON:

Q. And that, if I understand, was not done? A. Wait a minute; let me conclude my answer.

371 Q. Certainly. A. But the right of sale was vested in us.

Q. The right of sale by whom to whom? A. By Mrs. Tarafa to Phillips and Davis.

Q. And did you ever exercise that right by selling to Phillips and Davis? A. By selling to Phillips and Davis?

Q. Yes. A. No; we did not sell to Phillips and Davis. How could Phillips and Davis sell to Phillips and Davis?

Q. That is a puzzle to me, Mr. Phillips, but your answer is that you had a right to sell this property. A. Certainly we had a right to sell this property to whomever we chose.

Q. You had a right to sell this property for Mrs. Tarafa to Phillips and Davis? Do you mean that? A. We had the right of sale by an option made to us by Mrs. Tarafa. We had not the right of sale; we had the right to purchase.

Q. And did you exercise that right? A. To purchase?

Q. Yes. A. Certainly. We exercised it, of course—that is, in this way——

Q. Madam Tarafa never sold this property to Phillips and Davis; did she? A. She sold it to whoever——

Mr. NORTON: The question is objected to, for the reason that the options have been put in evidence, and show what they were, in writing.

372 By Mr. DARLINGTON:

Q. The first and only sale Madam Tarafa made was a sale to Micou for you and your associates? Was not that it? A. She sold it to whoever we told her to sell it to.

Q. Oh, Mr. Phillips, was not the first and only sale Madam Tarafa made one to Micou for you and your associates?

Mr. PUTNAM: Do you mean the deed?

Mr. NORTON: The question is objected to as misleading to the witness. The options, in writing, show exactly what the transaction was.

Mr. DARLINGTON: The learned counsel clearly does not comprehend the question. I am asking nothing about the option.

Mr. NORTON: Counsel thinks he does.

(By request, the Examiner read aloud the pending question.)

By Mr. DARLINGTON:

Q. Can you not answer "yes" or "no" to that? A. For me and my associates? Is that the wording?

Q. To you and your associates. A. You said, "for you and your associates."

Q. Yes; that is right. A. Yes, sir; it was for me and my associates, at our dictation.

Q. And those associates included General Reid and Dr. Sowers; did they not? A. No, sir; they included General Reid, Mr. Herbert and Mr. Micou. Dr. Sowers was absolutely not included.

Q. Dr. Sowers came in afterwards. You have said that
373 prior to your coming to Washington in January, 1904, you and Mr. Davis had conditionally agreed to take the 4,000 acres for $10,000. What was the condition? A. If we so desired.

Q. And Micou had told you, before you came to Washington, that he would go in with you, you testified? A. Yes, sir; that he would like to be associated with us.

Q. Your testimony in chief, Mr. Phillips, was that Micou said, in December, 1903, that he would go in with you and Davis, and thought he could interest some of his friends. Is that correct? A. That is correct.

Q. He would go in with you to do what? A. Go in with us to purchase this land.

Q. You further stated, in your direct-examination, that in Washington it was agreed that Micou should go in with you and Mr. Davis in buying and in getting others to buy with you. That is correct, is it not? A. Yes, sir.

Q. To buy what—four thousand acres or a larger tract? A. Four thousand acres.

Q. And to buy it from whom? A. From the owners, or from us.

Q. Did Micou tell you that he would go in with you and Davis to buy the land from you? A. The basis of our agreement with Mr. Micou is in evidence in writing.

Q. You have told us what Mr. Micou said to you—he said he would go in with you and Mr. Davis to buy this land. I am
374 now asking you if he said he would go in with you to buy it from yourselves? A. Well, now, I really do not see that there is any necessity of our arguing the case.

Q. No; I do not want any argument. A. (Continuing:) When the contract which you have in evidence there states just exactly, in and of itself, the basis on which Mr. Micou went in with us, Mr. Darlington.

Q. What contract do you refer to? A. The Richmond contract.

Q. That was not signed until after General Reid had gone in with you and signed the papers; was it? A. No, but verbally, as I stated, before—verbally that basis had been agreed on before.

Q. I am now asking you about the contract which existed at the time General Reid was induced to sign "Complainant's Exhibit No. 2." At that time had Micou verbally agreed, or agreed in any other way, that he would go in with you and Mr. Davis in buying this land, these 4,000 acres, from you and Davis? A. Mr. Micou had agreed verbally—the contract that was drawn up by him in Richmond and signed by us was the agreement that we had verbally before General Reid purchased into the Company.

Q. Once more: Prior to the time that General Reid was induced to sign Complainant's Exhibit No. 2, had Micou agreed that he would go in with you and Davis to buy this land from you and Davis? A. Well, I do not see any other way to answer that
375 than the way I have answered it I cannot——

Q. You cannot answer it except by referring to what you did afterwards? A. I explained to you that our agreement verbally, before General Reid purchased, or, rather, before General Reid signed the agreement, was the same thing that was reduced to writing by Mr. Micou in the Hotel Jefferson, Richmond.

Q. What enables you to remember that? A. Why, from the fact that Mr. Micou drew it up at that time; we all remembered it and signed it, and from the conversations prior.

Q. And although you remember it, you cannot tell me now what the verbal agreement was, except by reference to this agreement?

A. Why, I do tell you what the verbal agreement was—that it was the same; that there was no change in Richmond of the original agreement.

Q. Mr. Phillips, this makes it necessary to protract your examination a little. I will ask to see that exhibit "Davis No. 1." A. Well, I am sorry, but I cannot see how I could state it differently from the fact, Mr. Darlington. The whole thing seems to resolve itself into a difference of opinion between you and me as to whether our option was a right of sale or not.

Q. My dear sir, I am not expressing any opinions. I am trying to get at such facts as you can give us from your recollection. The agreement "Exhibit Davis No. 1," to which you refer, pro-

376 vides that if you, Davis and Herbert & Micou should take stock in the corporation instead of money for the whole or any part of the excess over $15,000 to be paid by the corporation for this land, then such stock should be divided, two-thirds to you and Davis, and one-third to the parties of the second part—that is, Herbert & Micou. Was that the verbal agreement existing between you and Micou at the time General Reid went into this arrangement? A. If that so states it, it was.

Q. Have you any independent recollection? A. I remember that we were to divide two-thirds and one-third. As to whether it was to be stock or money, I do not remember.

Q. Have you any independent recollection whether there was such an agreement existing between you and Micou at the time General Reid signed these papers, Complainant's Exhibit No. 2? A. There was an agreement existing that Mr. Micou should participate one-third in $10,000; whether it was to be stock or money I cannot state exactly.

Q. Mr. Phillips, let me see if I can state this question so that you can grasp it. At and prior to the time when General Reid signed this original agreement, Complainant's Exhibit No. 2, was there an agreement between you and Micou that if any part of the excess over $15,000 was taken in stock, that excess was to be divided between you parties in the proportion of two to you and Davis and one to Herbert & Micou? A. Yes; there was an agreement that we would have a division of two and one.

Q. That does not answer my question. A. Yes, it does.

377 You asked me if there was such an agreement. I say, "yes; there was an agreement"——

Q. No; my question was, was there an agreement that if any part of the excess above $15,000 was taken in stock, you should divide that stock in the proportions of two to you and Davis and one to Micou? A. As I remember, that was the agreement; yes.

Q. When did you make the agreement that you would take the $15,000 of excess in money, divide that, and then divide forty per cent. of the stock in addition between you? A. That we would take the $15,000 excess in money?

Q. Yes, and also divide forty per cent. of the stock in addition thereto? When did you make that agreement? A. We never took any $15,000 excess in money.

Q. How much did the Widow Tarafa get for the property? A. $20,000.

Q. How much did the Company pay? A. $35,000.

Q. Is not that a difference of $15,000? A. I know this: that we never divided any $15,000, because we——

Q. Because you did not get it? A. Because we had to pay out of that for our own stock a great portion of that $20,000 that was paid in.

Q. How much did you pay? A. For 22 shares, if I remember right.

Q. How much money did you pay? A. At that time?

Q. At any time, for your stock? A. Well, my stock has cost me, first and last——

378 Q. Oh, my dear sir——

Mr. NORTON: Let him answer.

Mr. DARLINGTON: He is not answering.

The WITNESS: Well, $6,000——

(After an informal discussion between counsel as to whether or not the witness was answering the question:)

The WITNESS: About $6,000, first and last, I have expended.

By Mr. DARLINGTON:

Q. Do you swear that you paid $6,000 for your stock? A. I did not make such a statement.

Q. The question I asked you was, What did you pay for your stock? A. My answer was that I had expended about $6,000, Mr. Darlington.

Q. I have not asked you, Mr. Phillips, what you have expended. I asked you what you paid for your stock. A. Do you mean at the time?

Q. At any time. What did you pay to this Company for your stock, in money? A. For the stock directly, nothing.

Q. This $6,000 that you speak of spending is what you estimate was the money spent in endeavoring to sell the groves under your contract of July; is it not? A. And prior to the formation of the Company.

Q. How much prior and how much subsequent? A. I suppose my part of it was just exactly—Davis and myself spent between $2,500 and $3,000.

379 Q. When? A. Prior to the formation of the Company.

Q. What for? A. For trips up here; paying Abbott to go and see the property; paying different things connected with the deal, and for—I beg to rescind to a certain extent my answer "for the stock direct, nothing;" for while the stock, if you count the profit we made, the first stock did not cost anything, still we paid a great part of that profit back (in fact, the major part of it) for the stock.

Q. Do you mean the profit you made off your associates? A. I mean the profit we made off of the Company.

Q. That means your associates; does it not? A. Well, the stockholders in the Company.

Q. You mean the profit made off General Reid, do you not? A. No.

Q. Whom else did you make any profit off of? A. We made it off of the Company. We did not make it off General Reid individually. We put the land in to the Company for $35,000, that cost $20,000; but while General Reid represents most of the Company, and apparently all of it, still, according to the stock, he did not.

Q. The cash profit which came into your hands was paid by whom? A. It was handed by Mr. Micou to Mr. Escalante.

Q. But who paid it? A. Mr. Micou was in representation at that time of the Company to be formed.

380 Q. Who paid the money, Mr. Phillips? A. Who paid the money?

Q. Yes. A. He paid it to Mr. Escalante.

Q. Who furnished the money? A. Well, General Reid furnished the amount that is set down opposite his name, and Mr. Micou the amount that was set down opposite his name.

Q. How much did Micou furnish? A. $1500—no; $1200, if I remember right.

Q. And General Reid furnished how much? A. I do not remember the exact amount.

Q. Something over $6,000? A. He furnished his assessment on his thirty-seven shares.

Q. Something over $6,000? A. I think the assessment was $175 a share—well, you probably know better than I do about that.

Q. Now, besides Micou and Reid, who furnished any of the money? A. We paid our proportionate part of the assessment, but we had our commissions—not our commissions; we had our profit off of the option to pay it with. So in one sense of the word, if you count the profits on the option as valueless, we paid none. If you count the profits on the option, which I suppose the Court will decide as legitimate money, we paid our part.

Q. That is, you took part of the money which Reed and Micou advanced, called it your profits, and paid it back to the Com-

381 pany? A. We all gave our checks to Mr. Micou for the amount of money.

Q. What check did you give; how much? A. Why, the Colonial books would show. I have not the check with me, but it was the assessment on twenty-two shares.

Q. About how much would that be, approximately? A. I would certainly have to refresh my memory and see what the exact assessment was on the shares; but it was the assessment on twenty-two shares. I think it was twenty-two times $175, which would be about $5,000.

Q. You drew a check for about that amount to the order of Micou, did you, approximately? A. Yes.

Q. Was that check ever paid? A. It was turned into the Colonial, and then handed back to me.

Q. Was it ever paid? Did Micou ever get the money? A. Micou never got the money; no. The check was handed to Mr. Escalante, and returned by Escalante to me.

Q. And never paid, was it? A. It never was paid—that is, in that way. It was paid, though.

Q. Mr. Phillips, we do not want to quibble about words. You know what is meant by the payment of a check, do you not? A. Certainly I know what is meant by the payment of a check.

382 Q. Well, now, was this check ever paid? You drew it on the Colonial Bank. Did the bank ever pay it to anybody? A. No, because it was never presented.

Q. It never was paid? A. It was returned to me in payment of my legitimate profits in the transaction from the sale of my option.

Q. Why did you go through the form of drawing a check which was never to be paid and then taking it back again? A. To close the deal up. It was suggested, I think, by General Reid, that we all give our checks to Micou. I saw no objection to it, and did it.

Q. Did you explain to General Reid that your check did not represent any actual payment that would ever be made? A. As far as the Company was concerned, it represented that much payment on the land.

Q. Did you explain to General Reid that the drawing of your check was a mere formality, and that it would never be paid? A. If the check had been presented, sir, to the bank, it would have been paid.

Q. Did you explain to General Reid that the drawing of your check was a mere formality, and that it would never be paid? A. It was not a mere formality.

Q. What else was it? A. It was my part of my assessment on my stock.

383 Q. Did you explain to General Reid that your check would not be paid in money? A. General Reid never asked me any such questions, sir.

Q. Did you tell him that it would not be paid? A. I do not see why I should have told him.

Q. You did not tell him? A. No.

Q. Well, why did you not say so, without waiting for me to go through all this form of questions? A. You knew very well that I had not told him why it should not have been paid.

Q. I think the Court will have occasion to know, or need to know. A. I do not see why.

Q. Did Davis also draw a check and give it to Micou? A. He did.

Q. And that was returned to Davis without being paid? A. It was returned by Mr. Escalante to me, the two checks together, with some money.

Q. And you know, do you not, that Davis's check was never paid, either? A. I handed Davis back his check, myself.

Q. And you knew, at the time these checks were being drawn, that they were not to be paid; did you not? A. I did not think there would be any necessity of their being paid; but they would have been paid had they been presented.

Q. But you knew they would not be presented; did you not? A. I did not know whether they would be presented and paid and

the money given to me for my commissions, or whether I would be paid in my own check.

384 Q. Well, if they were cashed, you knew you would get the money for them, so that you would not be out of pocket; did you not? A. I did.

Q. Did you tell General Reid that? A. I have already answered that question, sir, above.

Q. Then you did not? A. I said I had already answered that above.

Q. You did not, did you? A. I answered above that he did not ask me, and I did not volunteer that information.

Q. I am asking whether you told him. Can you not say "yes" or "no?" A. He did not ask me, and I did not volunteer that information.

Q. Very well; now we have an answer. You testified in chief that a plan of forming a company was brought up and discussed, and putting the land in at $25,000, before you met General Reid? Is that correct? A. Well, now, as you are so particular about those things——

Q. I am not at all particular. A. I met General Reid about ten years ago, first; was it not, General?

General REID: No.

Mr. DARLINGTON: Never mind.

The WITNESS: It was a long time.

By Mr. DARLINGTON:

Q. I mean, Mr. Phillips, before you met him in connection with——

Mr. NORTON: Just let him finish. Just go ahead and an-

385 swer the question, Mr. Phillips.

(The pending question and answer, as far as it had proceeded were read aloud by the Examiner.)

By Mr. DARLINGTON:

Q. I am referring, Mr. Phillips, to your meeting General Reid in connection with this transaction. A. In connection with this transaction? I think you are right; yes, sir.

Q. To whom did you discuss putting in this land at $25,000? I mean, to whom was the land to be put in at $25,000? A. To a company that was to be formed. The different people that we discussed the matter with were Mr. Billings and that gentleman who was a clerk in the Navy Department—I forget his name—and General Reid.

Q. Please look at Complainant's Exhibit No. 2, and state by whom that was prepared. A. (After an examination.) I am not sure by whom it was prepared. It was discussed by Mr. Davis, Mr. Micou and myself. I think either Mr. Davis or Mr. Micou dictated the agreement.

Q. If Mr. Davis testified that you prepared it, is he mistaken? A. I cannot say that he would be, because, as I stated, it was discussed and then whether I dictated it or whether he did or whether Mr. Micou did, I do not remember.

Q. Now, who prepared Complainant's Exhibit No. 1? A. I think I did, sir.

Q. Do you remember at what stage of the matter—how
386 long before you met General Reid in this connection? A. I think it was after I met General Reid in this connection.

Q. Did you not show that to General Reid at your first interview with him upon this subject? A. I am not sure whether it was the first or the second or the third.

Q. Complainant's Exhibit No. 1 states, "Property will cost $25,000, 50 per cent. in cash and 50 per cent. in twelve months." Did you not, at the time you prepared this paper and showed it to General Reid, have an option on this property at $10,000 instead of $25,000? A. We had an option on the property at $10,000.

Q. Did you tell General Reid so? A. No, sir.

Q. Did the property cost 50 per cent. in cash or 25 per cent. in cash? A. It did not cost 50 per cent.; I forget the exact amount that we were to pay.

Q. You made a $5,000 payment on a $20,000 purchase; did you not? That was the first payment? A. That was when the other property was added to that.

Q. "The promoters are to receive forty per cent. of the stock of the proposed company as their share for promoting and carrying out the enterprise." Who were the promoters? A. Well, Herbert & Micou, Davis and Phillips, at that time.

Q. Did you tell General Reid that, in addition to what is here stated the promoters were to receive, they were to get
387 $15,000 in cash? A. I did not regard that as promotion money.

Q. If you were to have forty per cent. of the stock for promoting and carrying out the enterprise, what were you to have the $15,000 for? A. For not exercising our right of option, not using it. The property,—as you doubtless know better than I do, when a man has an option, I think it is, in the eyes of the law, his to sell, if he has a legal option.

Q. Did you explain to General Reid that you and Mr. Davis were not going to exercise your option? A. No, for I considered that we were exercising it.

Q. You were to get $15,000 for not exercising it, and yet you were to exercise it? A. We did not mention Mrs. Tarafa's name, as I remember, nor anyone's name, in this connection, but that the property was to cost the Company $25,000; and that was the basis upon which these gentlemen entered.

Q. Again, I find the following in Complainant's Exhibit No. 1: "The remaining $90,000 worth of stock will be given to the people who subscribe the $15,000 now necessary and who obligate themselves to pay the remaining $15,000 if found necessary." Who were those people? Did that include you and Davis? A. That included Davis, Herbert & Micou, myself, General Reid, and Mr. Billings, I think, signed the first one, too.

Q. Now, passing to Exhibit No. 2, it begins with the recital
388 that Charles T. Phillips, Norman H. Davis, Hilary A. Herbert and Benjamin Micou had secured an option on a tract of land

in Cuba of 4,000 acres. Had Phillips, Davis and Herbert & Micou secured an option on 4,000 acres of land? A. That was placed that way because we had given them an interest in the option for assisting to sell the property; or, in other words, we had agreed to give them a commission for their work.

Q. Exhibit No. 2 further provides that you, Davis, and Herbert & Micou would acquire this tract for a company to be organized at the price of $25,000? A. Yes, sir.

Q. Acquire it from whom? A. We would acquire it from the owner.

Q. Who was that? A. At that time Mrs. Tarafa was the owner, and we had an option on it.

Q. My question is, From whom were you to acquire this tract of land for the Company at $25,000? A. From the use of our option, or from——

Q. From the use of an option from a person; I am asking from what person you were to acquire it? A. I suppose in the eyes of the law the man that has the option is the owner of the property. It would be, then, from ourselves; please state my answer in that way.

Q. Then you would acquire it from Phillips and Davis, for Phillips, Davis, Micou and Herbert? A. Yes, sir.

Q. So that you, Davis, Herbert & Micou, were agreeing to
389 sell this property to the Company for $25,000? A. Yes, sir.

Q. Did you tell General Reid—that you, Davis, and Her-
390 bert & Micou were the sellers? A. I never did.

Q. As a matter of fact, Mr. Phillips, did Mr. Herbert know anything about this alleged arrangement which you had with Micou, as far as you know? A. I judge that he did, though at the time I did not presume so, as I had not seen Mr. Herbert but once that I remember of in the deal, and my negotiations had been carried on almost entirely with Mr. Micou.

Q. When did you judge Mr. Herbert knew of it? I mean, when did you first assume that he did? A. I never thought about it until long after the company had been formed, presuming that Micou was the legal representative of the firm, and that it was a firm business; and after I wrote him a letter stating most clearly the whole transaction, I did not receive a satisfactory answer.

Q. That letter was written after this suit was brought: was it not? A. After the suit, sir. Then I judged that he must have known about it.

Q. You mean after he received your letter? A. After he received my letter, and his answer.

Q. Have you that answer? A. Wait a minute: The reason that I presumed, prior to that, that he did not know about it, was the fact that General Reid brought suit against us, and that Mr. Herbert had signed the proceedings in the name of the Las Ovas Company; and if he had been cognizant, he must have known that he was suing the firm of Herbert & Micou as well as Davis and Phillips.

391 Q. Have you Mr. Herbert's reply to your letter? A. No, sir; I have not.

Mr. DARLINGTON: We call for its production, gentlemen, and

claim the right of putting in secondary evidence unless it is produced.

The WITNESS: I could not possibly put it in evidence, for the reason that I have not got it.

Mr. DARLINGTON: What became of it?

The WITNESS: I suppose I misplaced it somewhere; I have lost it.

Mr. DARLINGTON: I shall also claim the right to put in Mr. Phillips' letter. I have not it here, but I shall be obliged to ask for an adjournment unless we can agree that I may put it in without first submitting it to the witness.

(The matter above referred to was subsequently left to an agreement between counsel.)

By Mr. DARLINGTON:

Q. How many times did you and Davis, or either of you, come to Washington before this Company was organized? A. Twice.

Q. The first time was in January, 1904; was it not? A. Yes, sir.

Q. What brought you to Washington at that time? A. We had to attend the stockholders' meeting of the Colonial Deposit Association, of which I was President and he was Secretary, and also to attend to the selling of our option—the making of a profit off of our option on the Tarafa land, which we regarded as an exceptional bargain, and felt sure that we could do something with.

392 Q. You would have come at that time whether this Las Ovas matter was on or not; would you not? A. Yes; but we would not have stayed that length of time.

Q. The additional expense was for the purpose of endeavoring to make a profit out of this option in the manner in which you did make a profit out of it? A. Certainly—to make a profit out of the option in any legitimate manner.

Q. Well, do you claim, Mr. Phillips, that expenses incurred in endeavoring to unload this option on this company at an increased and secret profit to Mr. Davis and yourself creates a right in you to be paid the expenses of that visit, or either of your visits?

Mr. PUTNAM: Objected to because the witness has made no such claim.

Mr. DARLINGTON: If we can agree that no such claim is made, an answer will not be insisted upon.

Mr. PUTNAM: The witness has made no such claim, I say.

Mr. DARLINGTON: Do we agree, then, that there is no such claim in this case?

Mr. PUTNAM: I have not said that. I said the witness has made no such claim, and for that reason the objection is made.

Mr. DARLINGTON: Very well; Mr. Phillips, that requires me to ask you to answer the question.

(By request, the pending question was read aloud by the Examiner.)

Mr. NORTON: The question is further objected to because
393 there is no evidence that, legally, there was a secret profit.

A. I claim that my profit in the sale of the option could not be estimated until my expenses were deducted, or, in fact, in any sale

without deducting expenses from the profits. We could not consider it gross profits.

By Mr. DARLINGTON:

Q. When you left Washington on the occasion of this first visit, had or had not the ninety shares been subscribed? A. They had been subscribed, but not as they were afterwards taken.

Q. Why, then, were you going to Richmond to get somebody else to take some of them? A. I came back from Richmond here, you know.

Q. Was not this subscription list signed and the ninety shares subscribed for before you went to Richmond? A. I think the provision was put in the subscription list that myself, Mr. Davis, Mr. Herbert and Mr. Micou as one, would subscribe for the balance; we subscribed for so much, and would subscribe for the balance if so desired.

Q. Had you not actually subscribed for it? A. In that sense of the word, yes.

Q. Had you not actually signed the agreement for it? A. I think we had. We had signed the agreement that I know had that wording. Whether the amount of stock, exactly, was put opposite our names or not I do not remember.

Q. Where is that agreement? I find no such wording in exhibit No. 2. A. It was here a while ago. You can see whether we
394 signed for the full amount or not.

Q. It is not signed for the full amount, because Herbert and Micou have not signed, and you state they did sign the original. A. (After examining paper:) It says this, as I stated: "That in case it is desired by the persons subscribing to $60,000 of the $90,000 of the stock, the remaining $30,000 will be taken by Messrs. Phillips and Davis and Herbert & Micou, to be divided between them as follows: $10,000 to Charles T. Phillips, $10,000 to Norman H. Davis, and $10,000 to Herbert & Micou." That is just what I stated.

Q. Now, that was stock on which no cash payments were to be required, to your knowledge, at that time; was it not? In other words, that was your profit stock, was it not, or a part of it? A. That would have been our profit; yes.

Q. So when you went to Richmond, you went there to convert your profit stock into money by selling it to Mr. Willard? A. Well, not for the sake of the money; but it was generally thought that Mr. Willard's name would give added prestige to the Company, and our object was not so much the sale of the stock as to have him connected with us.

Q. But the point I want to get at is whether, if you had sold any stock to Willard, the money was to come into the treasury of the Company, or to go into the hands of yourself, Davis and Micou? A. It would have gone to the payment of the $25,000 on the
395 land.

Q. Why, only $10,000 was to be paid for the land. A. For the payment that the Company was to pay.

Q. But when the $25,000 was paid, then this money would have

been divided between Micou and yourself and Davis, as you claim, as your profit in the matter. A. Why, certainly; it would have been our commissions; yes, sir.

Q. So that the Company would have had no interest in that sale? A. The Company would have had none? The Company would have had a decided interest in the sale.

Q. In Mr. Willard's name? A. For the reason that it was universally agreed by everyone who had signed for stock or who had any connection with the Company that Mr. Willard's name as a business man would add materially, on account of his and his father's prestige, to the strength of the Company.

Q. But the Company would have had no interest in the money which he paid? A. Why, no; because the stock had already been subscribed for by Phillips, Davis, Herbert & Micou, or agreed to be taken by them; but they would have benefitted by the annexation of another strong man to the board.

Q. You state that about February 1st Micou and Reid came to Havana, or to Cuba, to purchase this $25,000 tract? A. Yes, sir.

Q. To purchase it from whom? A. To purchase it from
396 the owners of the tract.

Q. Who were they? A. As I stated before, Mr. Darlington, it was in the name of the widow Tarafa. She owned the entire tract.

Q. They did not have to come to Cuba to purchase the tract from you and Davis and Micou and Herbert; did they? A. No; they could have purchased without ever coming to Cuba. It would have been only a question of arranging the deeds.

Q. They came to purchase the tract from Madam Tarafa; did they not? A. They came to purchase the tract of land.

Q. And you cannot tell us from whom? A. I doubt if either one of them knew who Madam Tarafa was at the time they came.

Q. Is the transaction so complicated, Mr. Phillips, that you yourself cannot tell from whom they came to purchase the land, or from whom they did purchase it? A. The transaction is not at all complicated.

Q. Then why not tell us? A. I have explained very clearly that Phillips and Davis had the option on the land from the Widow Tarafa, and that General Reid and Mr. Micou came to Cuba with the intention of purchasing the tract of land of the Widow Tarafa through the option of Phillips and Davis.

Q. When did you first meet this Mr. Howard, if you ever
397 have met him? A. I never have met him, sir.

Q. Did you ever have any correspondence or communication of any kind with him? A. Not that I know of.

Q. You did not ask him to go on this visit to the lands? A. I personally object to the question, because I have stated most distinctly that I never met him.

Q. I do not want to do anything that is objectionable; but I am asking this question because your co-defendant, Mr. Davis, says you paid his expenses there. A. Well, I paid my pro rata part of the necessary expenses.

Q. But that is not his statement. His statement was that you paid

his expenses, if I recollect correctly, at the request of General Reid. That is why I am asking this question. A. Well, Mr. Davis was mistaken.

Q. So, you see, I am not asking these questions for useless purposes. A. Mr. Davis is mistaken in saying that I paid his part of the expenses. I paid my pro rata part of the expenses of the appraisers.

Q. But that is not the point at all. His testimony was that you paid the expenses of Howard to make that visit.

Mr. PUTNAM: At the request of General Reid.

Mr. DARLINGTON: Yes; I think at the request of General Reid.

The WITNESS: That may be very probable, because I know that General Reid was extremely desirous that Mr. Howard should
398 go after he had met him.

By Mr. DARLINGTON:

Q. But you testify now that you never saw Howard, either before or after that visit. A. I never did, sir.

Q. One moment—and that you never have had any communication of any kind with him? A. No, sir. My entire communication with Mr. Howard was through what General Reid and Mr. Davis said about him. I never spoke to him nor wrote him that I remember.

Q. Did you pay his expenses? A. I paid my pro rata part.

Q. Oh, you paid your pro rata part? A. My pro rata part of the expenses of the trip.

Q. To whom did you pay that? A. I paid it to Davis. Davis, in all of the preliminaries of this matter, kept the accounts. We were in business together, and he charged to my account whatever my part was.

Q. After that visit you say that General Reid declared that he would not go into the deal at all? A. Unless——

Q. Unless Micou should have no advantages which he did not have? A. In the promotion stock; he would not agree to go in and take less promoter's stock than Mr. Micou.

Q. He claimed that Micou was not entitled to any more profit out of this thing than he was? A. That was his claim.

399 Q. Now, when you agreed that he should have part of the promoter's stock, did you tell him, or did you withhold the fact, that Micou was still getting very much more than he in the division of the excess over the price the Widow Tarafa got? A. I said nothing to him about it.

Q. Why, Mr. Phillips, when General Reid was declaring that he would not go in unless he went in on equal terms with Mr. Micou, why did you withhold the fact from him that he was not doing that, and that Micou was making a secret profit of which he knew nothing? A. General Reid was basing his objection on the fact that he personally could not afford to have it appear that Mr. Micou was receiving this stock when he was not, and that for the looks of the thing he would not go into it.

Q. You have testified over and over again that General Reid said

he would not go in unless he went in on an equally advantageous basis with Mr. Micou. A. He claimed that he would not go in unless he——

Q. And my question is, now, after he told you that, why was it that you withheld from him the knowledge that you had that Mr. Micou was making a large secret profit which he was not? A. Because he did not ask me.

Q. That is the only explanation you can give? A. That is the only reason that I did not tell him. If he had asked me I would have told him.

Q. You were quite aware, were you not, that General Reid did not know that this secret profit was being made? A. Oh, I
400 did not think that he knew.

Q. You testified in chief that it was agreed by all that the title should be taken in Micou's name, to be transferred to the Company when formed; that is correct, is it not? A. Yes, sir.

Q. Why, then, was the title taken in Escalante's name? A. The property was taken in Escalante's name mainly for the fact that Claudio Mendoza, when we were discussing the censo questions, said (and, in fact, when he said it I remembered that it was a fact) that where a censo had been transferred the second time without being mentioned, under the laws of Cuba the third party would not have to pay that censo; they could not go back on him twice. If two transfers had been made and registered without the censo being mentioned in them, then the third party would not suffer, and there were some censos that, legally speaking, were obsolete, with the exception that the other transfer had not been made. Now, the exact amount of total censos on the property I do not remember. I think they amounted to $10,000 or $13,000, and there were $2,000 and some that were "vigente," as they call it—that is, living. And the others probably might be revived if there was not a second transfer in there.

Q. You say it was "mainly" on that account. On what other account was title taken in his name? A. Well, that was the main reason. You asked me the reason.

401 Q. What other one was there? A. At the time I did not discuss any other reason, myself.

Q. I am not asking what you discussed, Mr. Phillips. What was the other reason? A. When the suggestion was made, I saw myself that it was a wise one, and that it should be done.

Q. Yes; but my question is what was the other reason? You say that was the main one. What was the other reason? A. If I remember right, Mr. Micou was the one who desired most that it should be done.

Q. Your co-defendant, Mr. Davis, has testified that one of the reasons why the conveyance was taken from the widow Tarafa to Escalante and from Escalante to Micou was that it was preferred that the Company should not know what profit was being made in the transaction. Was that the other reason? A. Yes; that was the other reason, though personally I would not have cared if they had known it.

Q. A part of the mortgage was put in Escalante's name? A. Yes, sir.

Q. Why was that? A. Because he was deeding the property to Mr. Micou; and should that mortgage be put in another name, it would have cost money, and Mr. Escalante was a trusted man of ours, and we did not mind the property for $2500 staying in his name. And again, I personally had no interest in the $2500 mortgage.

Q. You had none? A. No, sir.

402 Q. Who did have? A. It was Mr. Micou's mortgage, most of it.

Q. Interest was paid on that mortgage; was it not? A. Yes, sir.

Q. Was that paid to Micou? A. It was paid to Davis, I think. Whether he gave me credit for half of it or not, I really could not tell you without looking at the books of the Colonial Company.

Q. Why was Micou to have that $2500 mortgage? A. It was his pro rata part. Davis and myself got most of our money that we ever got out of it in the first transaction.

Q. All that you were to get, you mean? A. I think probably there might have been $60 of that mortgage that was mine, or something of that sort—so small an amount that I have never considered or thought of it, or never have considered or thought myself interested in it.

Q. Let me call your attention to the fact that the only money division at the time of the purchase was $2811. Is that all that you and Davis were to get out of it? A. Was it $2811, or $2200?

Q. According to Mr. Davis' testimony, it was $2811. A. I got my half of that money division.

Q. Was that all you were to get? A. And afterwards I got $500 when the Sowers stock was sold. I think my division was $1100, and afterwards $500.

Q. But the question I am trying to get at is, you say that this mortgage which Escalante held of $2500 was to be Micou's; that you and Davis had gotten all of your share of the profit except

403 about $60? A. Yes.

Q. I want to see how it was——. A. Our money was used in payment of our stock.

Q. Was not a part of this cash payment also credited to Micou in payment of his stock? A. If I remember, Micou out of the $1500 kept $300. Out of the $1500 that Colonel Reid loaned him, he kept $300. I got his check cashed for him, and I think I handed him back either $300 or $200 that he needed. I think it was $300.

Q. And the $1200 was simply the difference between his share of the profits and his assessment on the stock? A. The mortgage was his share, together with what he paid on his stock.

Q. Did you ever tell General Reid that while Escalante held this mortgage, it did not really belong to him? A. That it would not have to be paid?

Q. No; that it did not belong to Escalante? A. I may have done so.

Q. Did you ever tell him that Escalante was not the owner of that mortgage? A. I may have told General Reid so.

Q. I am not asking you what you may have done. Did you tell him that? A. I do not say—it is very probable that I did, but I cannot swear to it.

Q. If you did, when do you think you told him so? A. I probably told him when the Micou question was up.

Q. Do you mean after this suit was brought? A. I think it was after; it may have been before. If I told him, I told him
404 while we were associated, I guess, together here in the formation of the Las Ovas Company; or it may have been up in Maine. I am not sure.

Q. Who did you tell him was the owner of it? A. Micou, if I told him anybody.

Q. Do you not know that you did not tell him anything of that sort until after the suit was brought? A. No, I do not, because I never had any reason not to tell him.

Q. If Micou was the owner of that mortgage, why did you and Davis keep it down in Cuba? A. I did not keep it down in Cuba; I was up here.

Q. Were not you and Davis associated together in this Colonial Trust Company? A. Yes, sir.

Q. And was not this mortgage kept in that Company? A. I do not know. It was kept by Davis. I do not know where it was kept. I never got the mortgage from Escalante, and never saw the mortgage.

Q. Now about this matter of the lake property: You say that Madam Tarafa's price for the lake land was $3,000? A. Yes, sir.

Q. That she offered to throw off $2,000 and take $1,000 as a kind of compensation for the censos? A. Yes, sir.

Q. And that you and Davis said you would take that, and if the Company did not like the arrangement you and he would take the lake land for $1,000? A. Yes, sir.

Q. And leave the censos on the property at the cost of the
405 company? A. On the lake land.

Q. And leave the censos uncompensated for on the Company's land? A. No; we would have assumed the censos at that price. That thousand acres would have made it only $3 an acre. We estimated then that it was a thousand acres. Afterwards, in the measurement, it developed that there was only 500; but we were estimating on a thousand acres.

Q. Your testimony in chief was that you would take the lake land for $1,000? A. Yes, sir; with the censos.

Q. The censos were not on the Lake land; were they? A. Oh, yes; they were over the whole property.

Q. Did you tell General Reid that you and Davis would take the land for $1,000, and that you would clear the other land of the censos? A. I explained to General Reid, as well as I remember, when he came back, the exact condition of it.

Q. That is not an answer to my question, Mr. Phillips. It is only consuming time unnecessarily. A. I do not think so. What is the question?

Q. Did you tell him that you would take the lake land for $1,000,

and in addition would clear the other property of the censos if the Company did not want to take the land? A. As I remember, we told General Reid that if the Company did not want to take the Lake land with Madam Tarafa's proposition, we would. The question of clearing the property of the censos, definitely stated, was not mentioned.

406 Q. And yet the $1,000 price was fixed so that the other $2,000 of the purchase price of the lake land should offset or compensate for the censos? A. That was Mr. Tarafa's offer—that he would sell the land to the Company for $1,000 as an offset to the censos.

Q. And that offer was accepted, and the lake land went into the deed? A. Into the deed; yes, sir.

Q. There were never two deeds in regard to that lake land; were there? A. No, sir.

Q. Both the lake land and all the other land was embraced in the deed from Madam Tarafa to Escalante, and the deed from Escalante to Micou? Is that right? A. That is perfectly correct, sir.

Q. Now, how were you and Davis and General Reid to go in as a side issue on this lake land proposition of $1,000? Were you to take the land for $1,000 and leave the censos for the Company to pay? A. I do not think the details were discussed at all. The proposition was simply made that if the Company did not want it we would take it.

Q. Now, do you tell us that during your May or June visit in 1904, after General Reid had bought his shares of the stock and had paid $6,000 and upwards on them, he told you that you and Davis could have all the profit above six percent.? A. No; he said

407 we were welcome to make all we could out of the transaction; that for his part he would be satisfied if he got his money with six percent.—if he got six per cent. interest on his money.

Q. Did he tell you that you and Davis or the other parties could have all the profits that might be realized above six per cent.? A. I do not think I made that statement.

Q. And he did not; did he? A. The statement that he made was that if he had his money with six per cent. interest on the investment, he was very well satisfied with it.

Q. And that you gentlemen could have all above that? A. No; he did not state that. He simply said he did not care what we made.

Q. That is right. That is what I want to get at. A. He did not care what we made so he had six per cent. on his investment.

Q. Did he explain how you were to make anything that he did not share? A. That he hoped it would pan out like we anticipated, but he would be satisfied with his money and six per cent.

Q. You say that all you told either Reid or Sowers was that the $25,000 was for payment for the land? A. I do not think I ever discussed that question at all with Dr. Sowers in regard to the price of the land, because he had become a part of the Company while I was away. I told General Reid that the Company would have to pay $25,000 for the land.

Q. And you did not tell him who was to get the money?
408 A. Certainly not.

Q. You did not tell him that you, Davis or Micou was to get any part of that $25,000? A. No, sir. As I stated previously, I did not regard it as necessary.

Q. Now, Mr. Phillips, you say that you sold a number of groves or made contracts for the sale of a number of them in Memphis? A. Yes, sir.

Q. And that the Company released the purchasers, and paid you nothing for your time and trouble. Is that a fair statement of the situation? A. I said that I sold, and that the contracts were rescinded, some of them by the Company and some of them by the purchasers.

Q. And that the Company rescinded them without paying you anything for your time and trouble? A. I never received one cent.

Q. My question is, do you consider that a fair statement? A. Well, I will just answer that by saying that I never received any compensation from the Company.

Q. My question is, do you consider that a fair statement of the transaction—to tell the Court that you sold these groves, and the Company rescinded the sales and paid you nothing? A. Do I consider it a fair statement?

Q. Yes. A. I do, because the Company did rescind the contracts.

409 Q. Were not these Memphis sales made on the condition that a representative to be sent by these Memphis subscribers should go to Cuba and make a favorable report A. Those that I sent in, to the best of my recollection, had nothing to do with the representatives of the Trust Company.

Q. And did not you yourself request the Company to rescind these contracts, on the ground that the condition had not been complied with and that he reported unfavorably? A. I requested them to return the notes.

Q. Did you ever collect any money on these contracts? A. Not a cent.

Q. So that the notes were all there was to return? A. The notes were all there was to return.

Q. Did you interpret your contract with the Company that they were to pay you a commission on contracts that you got for groves that never materialized, on which no money was paid by the purchasers? A. I certainly expected no commissions where I did not make legitimate sales.

Q. You held at one time some stock which has been referred to in the testimony as the Parker stock; did you not? A. Yes, sir.

Q. How did Parker get any stock? A. He bought it from me.

Q. That was the stock for which you had made no payment other than what you call your profits; was it not? A. I do not remember.

I believe that I had paid one or two assessments on that, be-
410 sides the first payment.

Q. It amounted to how much, if you remember? A. I do not remember; it was a small amount.

Q. There was also what has been referred to as Ricks' stock? A. Yes, sir.

Q. Is that stock which you sold to Ricks out of the profit stock? A. It is stock that I sold out of what you can designate as profit, or you can designate it as real stock, or you can designate it as assessment stock.

Q. As a matter of fact, it was stock on which you had paid nothing other than what you claim to be your profit on the transaction? A. It was stock on which I had paid good commission money.

Q. You mean the commission you realized out of the way in which you handled this option? A. Yes, sir.

Q. I want to show you a letter bearing date April 20th, 1905, addressed to General George C. Reid, purporting to be signed by you, and asked you if you wrote and signed that letter? A. (After examining letter:) Yes, sir.

Q. Let me read you from this letter as follows:

"Have you heard anything from Ricks lately? He has paid me all except $400 on his stock and that is not yet due. I have it in the shape of a note, and presume that the note is good, so I am not worrying about that; but I do think you ought to take the
411 Parker stock off my hands at what it has actually cost me."

What did you mean by "what the stock had actually cost you" in this letter?

Mr. NORTON: The question is objected to unless the letter is put in evidence; the objection being to putting in parts of a letter in this way.

A. By that I meant, as I stated further in the same letter, or, rather, as I stated prior to that in the same letter, that the stock had cost me in money, time, attention and loss a great deal more than the $21,000 that the General's stock had cost him. That is answered in the same letter.

Q. Did you mean that the General ought to buy the Parker stock from you for $21,000? A. No; I meant that the General should buy the Parker stock from me at what it appeared on the books it had actually cost me in money.

Q. You have testified today that the total cost to you and Davis was about $6,000, have you not? A. I spoke of that in regard to money itself; yes, sir.

Q. Where did you get the other $15,000 from which you make up this $21,000? A. When I left Cuba to take charge of this, my business was worth to me, in straight salary (as I can demonstrate to you) $500 a month, and with perquisites and other deals had never run under $1,000 a month, and some months had gone as high as $3,000. While I did not resign my position as President of the Colonial, I agreed, if they would give me a year's leave of absence,
412 to take a very much smaller salary—a salary of $250 a month; and with it I lost a good many advantages that would have accrued to me as president of the Colonial. To
413 cite you one illustration: Several very wealthy lumbermen from Blairsburg, Tennessee (the town that I was raised in)

came to Cuba especially to see me to purchase some property. Owing to the fact that I was occupied with these affairs, I missed the sale.

Q. What were you doing that led you to sustain these losses? A. Endeavoring to sell the groves of the Las Ovas Company.

Q. Under your contract of July 11th? A. Under my contract of July 11th.

Q. And you claimed that the time you spent in that ought to be charged against the Company? A. I did not. I claimed that I had actually suffered that loss—if you will allow the letter to go in as evidence with my statements above there, I do not think there will be any trouble in arriving at my meaning.

Mr. DARLINGTON: I have no objection to the letter going in if these gentlemen on the other side want it.

Mr. NORTON: We request that it be put in.

Mr. DARLINGTON: Then they offer it, and I make no objection.

(The letter above referred to was thereupon offered in evidence as above stated, and the same is filed herewith, marked "Exhibit Phillips No. 1." Said letter is in words and figures following, to wit:)

"ATLANTA, GEORGIA, *April* 20, 1905.

General Geo. C. Reid, Kimball Building, 1417 G St., Washington, D. C.

414 "DEAR GENERAL: Your favor of the 18th to hand and contents carefully noticed. I note what you say in regard to the letter from Davis in respect to his buying half of the Ricks & Parker stock with you. In letter that I received from Mr. Parker the other day he stated that you had told him that on the 4th of May this stock would be sold. He has returned the stock to me for me to make what disposition I please of it, as he is unable to meet the other payment and has not as yet paid me for the stock. I notice you say that you are rather inclined to smile slightly at my statement that Losovas has cost me more than it has any one else, and I assure you that if I was in your place with over one-half the stock in my possession, I would smile too. Losovas has cost me, by my absence from Cuba endeavoring to work it, a good deal more than the $21,000 you paid, and I have absolutely nothing to show for it.

"Have you heard anything from Ricks lately? He has paid me all except $400.00 on his stock and that is not yet due. I have it in the shape of a note, and presume that the note is good, so I am not worrying about that; but I do think you ought to take the Parker stock off my hands at what it has actually cost me. In the event of that being done I do not care what disposition you make of the Ricks stock.

"I note what you say in regard to laying the matter before the Board, but that, General, is not necessary, as "You are the board," and your *ipsi dixit* is the thing that counts. I will be here until next

Wednesday and hope that you will let me hear from you defi-
415 nitely before I leave, as I wish to settle this matter in some form or other before I go, as I see from Mr. Parker's letter that I cannot delay action until the 4th of May.

With the very kindest regards for yourself and family, I am,
Sincerely yours, CHAS. T. PHILLIPS."

By Mr. DARLINGTON:

Q. I hand you a paper bearing date January 26th, 1905, addressed to the President and Secretary of the Las Ovas Company, purporting to be signed by you. Is that your handwriting? A. Yes, sir.

Q. You made the sales to Mr. Davis and General Reid that are mentioned in that paper; did you? A. Yes, sir.

Q. What stock did that leave you? A. It did not leave me any; but afterwards Mr. Davis wrote me that it would be impossible for him to make the payments on seven shares, I think it was, that he had not paid on. I think it was all paid-up stock, too. And he returned me the stock, and then afterwards bought it again.

(The paper above mentioned was thereupon offered in evidence by counsel for the complainant; and the same is filed herewith, marked "Exhibit Phillips No. 2." Said paper is in words and figures following, to wit:)

"To the President and Secretary of the Las Ovas Co. Inc.

GENTLEMEN: This is to certify that I have this day sold to
416 General Geo. C. Reid 14 shares of my stock in the Las Ovas Co. 8 of these shares being non-assessable and 6 shares assessable, and also I have sold to Norman H. Davis 13 shares of said stock—7 shares of non-assessable stock and 6 shares of assessable stock.

"You will please issue the stock to the above gentlemen as indicated.

Yours truly, CHAS. T. PHILLIPS.

Washington, D. C. Jan'y 26, 1905."

(Written on back:) "I hereby authorize Gen'l Geo. C. Reid to make the transfer. CHAS. T. PHILLIPS."

By Mr. DARLINGTON:

Q. This new agreement with Mr. Davis under which you were to take back seven shares, was never carried into effect by any transfer on the books? A. I think I wrote General Reid a letter, and I think Davis wrote a letter to the General also, telling him that some of the stock had been transferred to me.

Q. Is your recollection about that sufficiently definite to enable you to state that either of you ever wrote General Reid any such letters? A. I know that I stated that personally to General Reid——

Q. When? A. In Havana, and I think also—I am not sure—in

Washington; but I know I did in Havana. In fact, I offered
417 to sell the seven shares to General Reid.

Q. After January, 1905, when did you next see General Reid? A. In Havana. It was the time that they were down there taking their evidence, right about the time you came down—right along in that neighborhood.

Q. That was after the suit; was it not? A. Oh, yes; that was after the suit.

Q. Why did you sell out your stock in the Las Ovas Company? A. Because I was dissatisfied.

Q. With whom? A. Well, I do not even know that I need to state. I had my personal reasons.

Q. You stated in your answer in this case that it was because of General Reid's conduct and his tendency to freeze out minority people. A. I do not remember of making any such statement.

Q. If you did make it, is it correct? Was there anything of that sort among your motives? A. Well, I thought the General wanted to be the boss absolutely, and that his ideas should go, having the major part of the stock.

Q. And you did not care to be in a company with a man who—— A. I do not ever expect to be again with any one man who has a majority in anything.

Q. Or with a man who wants to boss things? A. Not if my ideas and his do not agree; I will sell or buy.

Q. Let me show you a paper purporting to be a letter from
418 you to General Reid, dated February 7th, and ask you whether you wrote it and whether you signed it and sent it to him? A. (After examining paper:) I recollect that letter; yes, sir.

(The paper above referred to was thereupon offered in evidence by counsel for the complainant; and the same is filed herewith, marked "Exhibit Phillips No. 3." Said paper is in words and figures following, to wit:)

"ATLANTA, GEORGIA, *February* 7, 1905.

"Col. Geo. C. Reid, Washington, D. C.

"MY DEAR COLONEL: Davis yesterday gave me receipt you wished me to sign and I enclose it to you with this letter. As I told you while in Washington, I had in view the formation of a company which I thought would be, in the course of time, one of the strongest financial institutions on the Island of Cuba, or in the States for that matter. It is almost the same that I one time contemplated forming a year or so ago in connection with the Colonial. Now I have thought since leaving Washington that I would do this: That I would send you my project in detail, with full permission to show it to your attorney, in whom I know from the conversations that we have had that you have the greatest confidence; or to any business man in Washington that you think would probably be interested. From what you have told me of the character of Mr.

B. H. Warner I believe that this project might interest him.
419 The beauty about it is, that it is entirely a new project and would not be weighted like the one I spoke to you about a year ago with the merging of some old company. I will simply say this, that I can myself at the present time, put $15,000.00 of my own good money in the project, and it is needless for me to tell you that I have unbounded confidence in it. I would like to hear from you in regard to the matter, and if you think you would like to take an interest in it I will forward the papers to you.

"What did you do about my $200.00? I wish you and Col. Herbert would get after Micou & Talty about this, and make them do the square thing, as poor old Heap is needing his money and it should be paid, and there is no question about the $200.00 being a legitimate debt to me.

"With kindest regards to Conrad and Mrs. Reid, I am,
Sincerely yours, CHAS. T. PHILLIPS."

By Mr. DARLINGTON:

Q. I now show you a letter dated January 27th, 1905, addressed to the Board of Directors of the Las Ovas Company, and purporting to be signed by you; and I ask you whether you wrote and sent that letter? A. I wrote that; yes, sir.

Q. Let me read you from this letter as follows:

"As the Secretary of your Company will inform you tonight, I have sold all of my stock in the Company to Gen'l Reed and Mr. Davis, and I have tendered my resignation, both as a Director of the Company and as Manager of the same, to take effect at once.
420 This has not been done from any lack of confidence in the proposition, but on account of my own private affairs."

Is that correct? A. That is my letter; yes, sir. It was because of my own private affairs that I did it; yes, sir.

Q. And that statement was correct; was it? A. I had no lack of confidence in the proposition—not a bit.

Q. The statement I have read from this letter is correct, is it? A. Yes, sir; the letter is just as I have stated it.

Mr. NORTON: We want the whole letter in evidence.

Mr. DARLINGTON: Counsel for the defendant request that the letter shall go in evidence, and offer it. Counsel for the complainant makes no objection.

(The letter referred to was thereupon offered in evidence as above stated, and is filed herewith, marked "Exhibit Phillips No. 4." Said paper is in words and figures following, to wit:)

"THE RALEIGH,
WASHINGTON, D. C., *January* 27, 1905.

"To the Board of Directors of the Las Ovas Co., Inc., Washington, D. C.

DEAR SIRS: As the Secretary of your Company will inform you tonight, I have sold all of my stock in the Company to Gen'l Read

and Mr. Davis and I have tendered my resignation, both as a director of the Company and as Manager of the same, to take
421 effect at once.

"This has not been done from any lack of confidence in the proposition, but on account of my own private affairs. I would like, however, to call the attention of the Directors to a fact which I am sure they have unintentionally overlooked:

"While I was in Washington the last time, we had a meeting of the Directors of the Association at which there were present Mr. Talty, Gen'l Reed, Mr. Micou and myself. After the meeting we were all at the Raleigh Hotel and were discussing the advisability of immediately planting groves on the part of the Company and in the course of conversation I mentioned the fact that I thought at least $200 should be allowed me on account of the extra expense that I had been put to in coming from Cuba here and devoting my time for three weeks to the writing of the pamphlet and getting out literature and other duties from which it was impossible that I could receive any remuneration in the way of commission. These gentlemen unanimously agreed to this and as I understood it, Gen'l Reed was instructed to put that in his minutes of the meeting.

"It is true that the meeting had adjourned, but when all of the Directors present agreed after the meeting that this should be done, I do not think it would have been illegal if the Secretary had inserted this in the minutes of that meeting. I am sure the Secretary was of the same opinion, for he agreed to advance Mr. Heap $15 a week out of that money and afterwards told Mr. Heap that he could not advance the money for the reason that that was not in regular meeting.

"I especially call your attention to this, from the fact that
422 there is still due Mr. Heap $75 for services rendered; that Gen'l Reed has given him $15, Mr. Micou has paid him $15, and I think this $200 should be allowed me, out of which I will reimburse Gen'l Reed and Mr. Micou and pay Mr. Heap. I am sure that Gen'l Reed, Mr. Micou and Mr. Talty will remember the incident perfectly and I hope you will take the necessary action in the matter to-night.

"With kindest regards for all of you and hoping that the project will meet with as much success as we anticipated in the beginning, though on different lines, I am,

Very respectfully yours,

CHAS. T. PHILLIPS."

Stipulation.

It is agreed that counsel for the complainant, who regrets not to have here present the letter written by Mr. Phillips to Mr. Herbert, of which he has testified, may offer it later upon proper identification without exhibiting it to Mr. Phillips; and that the Examiner may sign the deposition of the witness Phillips for him, as he is about to leave the City.

CHARLES T. PHILLIPS,
By the Examiner, by Consent.

(Counsel for the defendants thereupon announced their
423 testimony closed, reserving the right to call for certain papers in the possession of the complainant at any time before the rebuttal testimony commences.)

424 *Testimony in Rebuttal.*

Filed January 23, 1907.

In the Supreme Court of the District of Columbia.

No. 25622. Equity Doc. 57.

THE LAS OVAS COMPANY, INCORPORATED, a Body Corporate,

vs.

NORMAN H. DAVIS ET AL.

Be it known That, at an examination of witnesses, begun and held on the first day of December, A. D., 1906, and continued by adjournment within noted, until the thirty-first day of December, A. D., 1906, personally appeared before me, the undersigned, an examiner in chancery, at No. 410 Fifth street northwest, in the City of Washington, District of Columbia, Mr. Frank A. Kane and Gen. George C. Reid, both of lawful age, witnesses called to testify on behalf of the complainant in the above-entitled cause, when and where the depositions of said witnesses, hereto annexed, were by me taken down in shorthand, from the oral statements of said witnesses, made in answer to interrogatories and cross-interrogatories propounded by counsel for the parties respectively, then and there attending, the said witnesses having been by me first duly sworn according to law; that said depositions were afterwards reduced to typewriting, were read over by said witnesses severally and were by them respectively subscribed in my presence.

I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

T. H. FITNAM,
Examiner in Chancery.

* * * * * * *

425 Met, Saturday, December 1, 1906, at ten o'clock a. m., No. 410 Fifth street northwest—present, Mr. J. J. Darlington, for complainant, and Messrs. S. A. Putman and J. K. M. Norton, for defendants—whereupon, Mr. Frank A. Kane and Gen. George C. Reid, having each been duly sworn testified severally on behalf of the complainant (in rebuttal) as is hereinafter respectively set forth.

(Mr. PUTMAN: Mr. Darlington, before proceeding with the examination of witnesses I will offer in evidence this stipulation and ask that it be filed, marked Stipulation Las Ovas.)

(Said stipulation is accordingly herewith filed, so marked, and annexed to the record.)

T. H. FITNAM, *Examiner.*

426 *Mr. Frank A. Kane.*

Direct examination.

By Mr. DARLINGTON:

Q. Please state your name? A. Frank A. Kane.

Q. Mr. Kane, in the statement of the account of Charles T. Phillips with the Las Ovas Company I find three items of $231.25; $138.75, and $224.00 respectively: Can you tell us by whom they were paid? A. The assessment of Mr. Phillips amounts to $370.00. Mr. Davis sent a check here for $157.50 and also sent an account showing that he had paid $462.50 as attorney's fee to Mr. Mendoza, and one quarter's interest to Mr. Areallano.

Q. Was Mr. Davis' communication in writing? A. I believe it was.

(Mr. PUTNAM: Answer objected to, and I shall move to strike it out.)

A. con. I think the $462.50 which made up that account, and the $157.50 which Mr. Davis sent by check made up the exact amount of the assessments of both Davis and Phillips.

Q. And you credited them accordingly? A. I credited them accordingly.

Q. Will you make search for this letter of Mr. Davis referred to and file it with your deposition? A. I will.

427 Q. Were you ever present at any conversation between the defendant Davis and Gen. Reid about notices to be given to Mr. Davis of meetings of the board of directors? A. Yes, sir.

Q. Please state what occurred?

(Mr. PUTMAN: Objected to as not being in rebuttal.)

(Mr. DARLINGTON: Counsel will recall that I went with him to Havana for the purpose of taking Mr. Davis' deposition, and remained there until I supposed the deposition was concluded. I find after I left, the testimony of Mr. Davis not given before, that he received no notices of the meetings of the board of directors, to which this testimony is offered in rebuttal.)

(Mr. PUTMAN: I cannot agree to the statement of Mr. Darlington that he left Havana thinking that the deposition of Mr. Davis had been concluded. Gen. Reid was asked about the notices given to Mr. Davis in his first deposition.)

(Mr. DARLINGTON: I believe Mr. Davis was to be cross-examined a little further when my steamer was ready to sail, to which the matter now under consideration belonged, if it was offered at all, and had been concluded.)

Q. Go ahead Mr. Kane? A. Mr. Davis gave Gen. Reid a power of attorney to vote for him at meetings of the board of directors when I was present, and made the remark that it was not of any use

sending him notices of those meetings as he could not get here at special meetings.

Q. Please look at the paper I now hand you and say what it is? A. (Viewing paper:) That is a power of attorney given by Mr. Davis to Gen. Reid.

(Said paper is offered in evidence and is marked Complainant's Exhibit Power.)

428 (Mr. DARLINGTON: I carried this paper with me to Havana for the purpose of cross-examining Mr. Davis about it but did not use it then only because I supposed that matter would not be gone into, it not having been referred to in his examination in chief.

(Mr. PUTMAN: The statement of counsel is objected to.

Q. Were you present at any conversation between Mr. Davis and Gen. Reid about the purchase of the stock of the defendant Phillips? A. Yes, sir.

Q. What if anything did Mr. Davis say about the price at which it could be purchased? A. Mr. Davis said that Mr. Phillips owed him money and was not able to carry this stock and meet assessments on it, and told me that he would sell it to Gen. Reid for exactly what it cost him.

Q. Cost whom? A. Cost Phillips.

Q. What connection if any had you with the purchase of the Micou stock, or part of it, by Gen. Reid? A. I had no connection with the purchase. I was instructed to figure out the actual cost of it on the same footing I did Mr. Phillips'.

Q. And by whom were you so instructed? A. Mr. Davis.

Q. How did you figure the actual cost of those shares—on what data? A. Mr. Davis had given an itemized statement of the

429 cost of the land; what each one had paid out in the beginning.

Q. Where is that statement? A. I have several of those in the company's files, which I can produce.

Q. Please produce those also on which you made this estimate of the actual cost. It appears that one share each of the stock of the company was transferred to you and to Conrad Reid and that you and he were elected directors: At whose suggestion was that done? A. Davis and Phillips both suggested that.

Cross-examination.

By Mr. PUTMAN:

X Q. Where did this conversation occur in which Mr. Davis told Gen. Reid that he need not notify him of the meetings of the board? A. That occurred at Gen. Reid's residence, where he was living then, 1631 Massachusetts Avenue.

X Q. When did it occur? A. I believe it was on the night of January 28th. We had a directors' meeting on that night and I believe it was right after the meeting that Mr. Davis told Gen. Reid that he could not appear at these meetings, and wrote out this power of attorney to him.

X Q. You never notified Davis of any of the meetings of the board after that? A. Yes, he was notified.

430 X Q. Who notified him? A. The secretary.

X Q. Who was the secretary? A. Gen. Reid.

X Q. You wrote the letters, did you? A. Part of them. There was also a stenographer there at the time.

X Q. Why did you send Mr. Davis notice of these meetings if he had instructed you not to do so?

(Mr. DARLINGTON: I object that the witness has not stated that Mr. Davis gave him any such instruction.)

X Q. Why did you do so if Mr. Davis did not consider it necessary to notify him?

(Mr. DARLINGTON: Same objection.)

A. Gen. Reid instructed me to send notice to all the directors of everything that went on in the meetings of any importance; and notices were sent to these directors.

X Q. You did notify Mr. Davis of every meeting of the board until the meeting of May 22d, did you? A. I cannot say for certain.

X Q. I mean every meeting between January 28th and the meeting of May 22d, 1905. A. I believe so; I am not positive about that; I cannot remember all these things.

X Q. Why did you not notify him of the meeting of May 22d?

(Mr. DARLINGTON: I object that it has not been proven that notice of that meeting was not given.)

X Q. Did you notify him of the meeting of May 22d? A. It is my impression that I did.

431 X Q. Have you got any written data or memoranda from which you can fortify your opinion of that? A. I don't think I have any written memoranda, but I believe we sent notices; it was customary.

X Q. I will ask you if you didn't show me at Gen. Reid's house copies of notices to Mr. Davis of every meeting between January 28th and May 22d and inform me that you were not able to find any evidence that you had sent Mr. Davis notice of the meeting of May 22d? A. I believe I did.

X Q. Notwithstanding you now believe that you did send Mr. Davis notice of the meeting of May 22d? A. Yes, sir.

X Q. Then did you send Mr. Davis notice of the meeting of June 28, 1905? A. I would have to consult the files to remember that; I cannot recall.

X Q. Is it not a fact that you looked for a copy of that notice also at Gen. Reid's house at the time you looked for the others I have just asked you about? A. I can't recollect just what two notices of meetings you did ask me for. I remember looking them up; or some of them.

X Q. You always kept copies of notices sent out, memoranda, I think, usually to where they had been sent, did you? A. Yes, sir.

X Q. If you had sent these two out which I have just asked you

about do you know of any reason why you would not have
432 kept the copy with the explanatory memoranda? A. The only reason would be they would possibly get mixed up or lost somewhere. That is as near as I can figure that out.

X Q. Mr. Kane, is it not a fact that Gen. Reid told you not to send these notices to Mr. Davis, of the meeting of June the 28th? A. June the 28th?

X Q. May the 22d to June the 28th? A. I am a little puzzled over these two meetings. I believe there was a meeting there at a certain time—May 22d to June 28th—I don't believe Gen. Reid informed me not to send notices; I am not positive.

X Q. You are not certain? A. I am not positive.

X Q. Did anybody else instruct you not to send notices to Mr. Davis of those meetings? A. No, sir.

X Q. You are positive of that? A. I am.

X Q. You say that Mr. Davis instructed you how to make the computation for Gen. Reid and Mr. Davis buying the Micou stock: Did Gen. Reid tell you anything about that? A. I don't quite understand what you mean. Gen. Reid and Mr. Davis were together in the office. Do you mean that he instructed me over and above Mr. Davis?

X Q. Yes? A. No, sir.

X Q. Did he instruct you the same thing that Mr. Davis
433 instructed you about making the computation? A. I have no recollection of his saying anything about it.

X Q. Did he agree to or dissent from Mr. Davis' instructions?

(Mr. DARLINGTON: I object that the witness has already testified that he does not remember that Gen. Reid said anything about it.)

(Immediately preceding question repeated.)

A. I could not say. Mr. Davis told me to figure out the exact cost of Micou's stock.

X Q. Did Gen. Reid hear Mr. Davis tell you that? A. Yes, sir.

X Q. And, so far as you remember he made no comment? A. No.

FRANK A. KANE.

Sworn to before me as aforesaid and subscribed, this 8th day of January, A. D., 1907.

T. H. FITNAM, *Examiner.*

(The following statement is made this 5th day of January, A. D., 1907, by the witness Mr. Frank A. Kane, before signing his foregoing deposition:)

With reference to the letter of Mr. Davis, referred to at p. 426 of complainant's rebuttal testimony, I find that I sent that letter to Major Runcie, Havana, when he was employed by the company as attorney in this matter. I have made diligent search, but cannot find it, and presume Major Runcie did not return it to me.
434 The letter showed that it had been press-copied, and Mr. Davis is now doubtless in possession of his letter press copy. I pro-

duce the paper given me by Mr. Davis as an itemized statement of the costs of the land referred to at pp. 428-429 of complainant's testimony in rebuttal. The parts of this paper referred to in typewriting were on it when delivered to me by him. The penciled memoranda and the momoranda in ink on the first page are in my handwriting, while the written memorandum on p. 2 is in the handwriting of Gen. Reid. The memoranda made by myself and Gen. Reid were put on the paper after its delivery to me by Mr. Davis.

FRANK A. KANE.

Sworn to before me as aforesaid and subscribed, this — day of January, A. D., 1907.

T. H. FITNAM, *Examiner.*

435 *Gen. George C. Reid.*

Direct examination.

By Mr. DARLINGTON:

(Mr. DARLINGTON: I now offer in evidence the letter of the defendant Phillips to Hon. Hilary A. Herbert, the right to offer which was reserved in Mr. Phillips' examination.)

(Said letter is herewith filed, marked "Complainant's Exhibit Letter, Dec. 28/05.)

Q. General Reid, in this letter of Mr. Phillips to Mr. Herbert of December 28, 1905, I find this statement: "I wish further to state to you that had General Read been frank and fair to me in his statements at the time of the organization of this Company, while you were absent from Washington, we would have had the success that we anticipated." Are you able to tell us to what that statement refers? A. I have not the slightest idea.

Q. Did the defendant Phillips at any time call to your attention anything on your part which he claimed had not been frank and fair? A. No, sir.

Q. This letter further states: "General Read at the time of going into this deal stated that if he could get 6% on his money he would be thoroughly satisfied:" And Mr. Davis, also, I believe has testified to some such statement by you. Please give us the facts as to those statements? A. I never said any such thing, either to Phillips or Davis at the time of going into this company.

436 Q. When, if at all, did you make any such statement? A. After I had learned the true condition of affairs with regard to the purchase of the property I would have been glad to get out of the thing, and I wrote to either Davis or Phillips——

(Mr. PUTMAN: We object to any statement in the letter unless the letter is produced.

(Mr. DARLINGTON: We cannot produce it. I did not know of it until this morning and I now call for its production and agree that it may take the place of the witness' statement when pro-

duced within two weeks from this date, which I suppose will be a reasonable time.

(Mr. PUTMAN: I also never heard of this letter until this moment and having no means of knowing whether it exists or not can make no agreement about it.

(Mr. DARLINGTON: Then I must rely upon the rule of evidence that we are not called upon to produce a writing which is out of the jurisdiction.

Q. Go ahead, General? A. I thought if I could get what it cost me to go into the company and a fair rate of interest—I forget whether I mentioned the rate of interest or not—I would consider such a proposition; not saying that I would take it.

Q. It has been testified by both Davis and Phillips that you were offered and declined reimbursement of all that you put into the company and a profit besides: What is the fact as to that? A. Davis made a proposition through Phillips, as I remember, to give Dr. Sowers and myself what our stock had cost us with a fair
437 increase to compensate for interest, stipulating that they were to make first payment, as I remember it, in two years, giving as security a mortgage on the land. Of course we did not consider a proposition like that.

By Mr. PUTMAN: Was the proposition made by Phillips or Davis in writing? A. Yes, my recollection is it was made in a letter.

(Mr. PUTMAN: We object to the answer and move to strike it out.

Mr. DARLINGTON, Continuing:

Q. Where is that letter? A. I think I can produce it.

Q. Please make search for it and produce it if you can. A. There was another proposition first made by Col. Herbert, but I am not certain whether that was made in writing through him or not.

Q. Please look at the letter of December 28, 1905, to Col. Herbert and state whether that is the proposition you are now referring to? A. (Viewing paper): This is the letter; this is the offer to which I referred.

Q. If the defendants, or either of them, at any time made any propositions offering other payment or security or any means of payment other than giving them time to sell the land and pay out of its proceeds if they succeeded in doing so to advantage, please state it? A. They never did.

Q. At p. 13 of his deposition Mr. Davis has testified that
438 you paid Mr. Howard's expenses on the trip to Las Ovas: Is that correct? A. No. That is not so. Davis paid the expenses of that trip and Davis, Micou and myself afterwards divided those expenses between us.

Q. When? A. The day after we made that trip, may be a day or two, in Havana, at dinner in a restaurant.

Q. At p. 14, Mr. Davis testified, and I believe Phillips also states that you said you did not care what Phillips and Davis made out of the deal, but that you were not willing for Col. Herbert and Micou to have any promoters' stock unless you received an equal amount. What are the facts as to that statement? A. The facts in regard to

that statement are these: At my rooms in the Villa Hermoso in Havana, immediately after I had been to Las Ovas to see the propery I said to Davis, Phillips and Micou that I thought I should share in the non-assessable stock as well as Herbert and Micou inasmuch as I had to pay so much more towards its purchase; that I was willing that Phillips and Davis should have promoters' stock, they had been the ones who originated the proposition and brought it to our attention. I never said that I didn't care what Phillips and Davis made out of it.

Q. At p. 21 of his testimony Mr. Davis testifies that he told you about the censo aggregating $5400.00 upon your return from Guantanamo: Is that correct? A. On my return from Guantanamo Davis and I were riding down town in his little carriage and
439 I was asking him about Micou's departure two days before I got back if he had found the deeds from Tarafa all right as I had instructed him not to pay any money unless everything was all right. Mr. Davis told me that there was a little censo on the property; that it did not amount to anything as a censo was outlawed in Cuba in thirty years, and this little censo referred to, he said, had been running forty years.

Q. Did he tell you its amount? A. My recollection is he mentioned something about $2500.00 (Twenty-five hundred dollars).

Q. Did he tell you there was a censo aggregating $5400.00 (Fifty-four hundred dollars)? A. No, he did not.

Q. At the same page he states that Phillips carried Micou and you to talk with Mendoza about the examination of title. Did you see Mendoza on the first trip which you and Micou made to Cuba? A. I did not.

Q. When did you first see him? A. I first saw Mendoza when I went down there to get the deeds to the property?

Q. When was that? A. My recollection is that was the third time; I think, March, 1905; I do not think I saw Mendoza until—March, 1905, and don't think I saw him the second time I went to Havana, in January, 1905. I never saw him in company with Micou or Phillips.

440 Q. At p. 22 Mr. Davis says: "In explaining the censos at $5400.00, I explained why the lake was taken in and secured at such a low price." What is the fact about that? A. When I returned from Guantanamo to Havana Mr. Davis first told me regarding the lake, that he had secured an option on one thousand acres which took in the lake, for one thousand dollars, and that if the company did not want it he would take it himself. I told him I thought that the company should have an opportunity to take it if they wanted it; that if the company did not want it I would be very glad to take it myself at that price.

Q. What explanation, if any, did he give you why the price of the lake property was one thousand dollars? A. None whatever.

Q. When did you first see Mendoza in company with Davis, if you ever did? A. My recollection is it was on my third visit to Havana, in March, 1905.

Q. He states, at p. 23, he thinks it was either just before you went

to Guantanamo or after your return on your first visit: Is that correct? A. No, sir.

Q. At p. 25 Mr. Davis testifies that he made no representation to you as to what price the widow Tarafa had received for the property and that he has never told you or Gen. Reid what she received: What is the fact? A. Just a moment—That he had never told me what she did receive?

441 Q. Yes? A. I don't know how to answer that; I don't think he ever told me what she actually received.

Q. Did he ever tell you what she was to receive? A. Yes. He told me she was to receive $35,000.00 for the six thousand acres.

Q. At p. 27 Mr. Davis testifies that he told you he had sold to Dr. Sowers Billings' stock for something more than the subscription price which was to be divided between all of you; that you and Micou told him that as he had been to some expense on the trip to Washington he could take that profit for the payment of his expenses: Is that correct? A. No; it is not.

Q. What if anything did Davis tell you at any time about his making a profit on Dr. Sowers' stock? A. I don't think he told me anything about his making a profit on it.

Q. At p. 25 he testifies that you and Micou told him when you came to Havana that Billings said he would like six shares of stock, but it was uncertain whether he would take them, and that you said you would prefer not to have him, Billings, in the deal: Is that correct? A. No, sir; I did not tell him so in Havana because I supposed Billings was going to take his stock. It was after my return to Washington that Micou told me Billings preferred not to take the stock unless he was obliged to on account of his affairs.

(Answer objected to as hearsay.)

442 Q. What have you to say about the statement that you and Micou told Davis in Havana that Billings said he would like six shares? A. I did not tell Davis so in Havana; Davis knew it as well as I knew it.

Q. State why you say that?

(Objection to why witness answers a question.)

A. Because Davis was here when Billings agreed to take the six shares. It was at a meeting in the room of Davis that Billings agreed to take the stock when we were both present.

Q. Mr. Davis testifies that he thinks Billings signed for the six shares of stock: What is your recollection? A. That is my recollection; that he did.

Q. You have heard the testimony of Davis about you and a Mr. Norton visiting the Las Ovas property together? A. I have.

Q. When, if ever, did you visit that property with Mr. Norton? A. Never.

Q. If you ever saw Mr. Norton before he appeared as a witness in this case please state where it was? A. I saw him frequently in Havana.

Q. How often had you visited the Las Ovas property before this

suit was brought? A. Twice. One in March, 1904, in company with Micou and others to view the land.

443 Q. What others? A. Mr. Davis; Mr. Howard and another land expert down near the property, one of the principal tenants on the place, and myself.

Q. When was the second time? A. The second time was in March, 1905.

Q. Who was with you on that occasion? A. Nobody but Mr. Davis. We went there to get the deeds from the Registrar.

Q. At p. 33 of his deposition Mr. Davis testifies that at a meeting between Major Runcie, you and himself, the deed from Madam Acosta to Escalante showed a purchase price of $20,000.00; that you asked why this was and Major Runcie replied that that had nothing to do with the matter; that hindsight was a good thing but that foresight was better, and that was a matter that should have been looked into at the time of the purchase of the property: Did that occur? A. Not to my recollection.

Q. What was said in connection with the $20,000.00 in the deed from Madam Acosta to Tarafa? A. When Major Runcie came to that part of it Mr. Davis said "I can explain that, Major; they mention the lowest price to lessen the transfer tax of one per cent."

Q. A letter from you to Mr. Davis of June 17, 1905, after you had learned of this transaction you had been offered for the avowed purpose of showing that you wrote in a friendly manner to Mr. Davis, though at this time the disclosure of this attempt had been made. Have you any explanation to make of that fact? A. I can

444 explain that. When I had concluded to institute proceedings against Mr. Davis, I wanted him to come to Washington, and I thought that, if I expressed myself in regard to that transaction to him as I felt, there would be very little prospect of his coming to Washington.

Q. At p. 45 of his deposition Mr. Davis testifies that he does not know whether he told you he and Phillips were the sellers of the land: Did he so tell you? A. No, he did not.

Q. You are familiar with the handwriting of Norman Davis? A. Yes, sir.

Q. You have corresponded with him back and forth? A. Yes, sir.

Q. Please look at the paper of January 28, 1905, purporting to be a power of attorney from him to you to represent him in the meetings of the board of directors of The Las Ovas Company, and state in whose handwriting is the signature 'Norman Davis?' A. It is Mr. Davis' signature.

(Mr. PUTMAN: Question is objected to as the law is well settled that no power of attorney can be given to represent a director in a company; a director cannot give a power of attorney.

(Mr. DARLINGTON: Not so far as his own interest is concerned?

(Mr. PUTMAN: My objection is on the record.)

Q. From whom did you receive that paper? A. From Mr. Davis.

Q. Please state the circumstances? A. It was at a meeting at my house, one night, of the board of directors and
445 Mr. Davis suggested that he give me a power of attorney to represent him in the meetings as it was impossible for him to attend these meetings of the directors or get notice in time to come from Havana up here.

(Mr. PUTMAN: I move to strike the question and answer out as not evidence in rebuttal.)

Q. At p. 87 Mr. Davis testifies that he does not remember whether he told you that Micou and Phillips would sell their stock for just what it cost: Do you remember? A. Yes, sir.

Q. What was said? A. Mr. Davis came to me and said that Phillips and Micou would not be able to meet their assessments for the payment of the land and that each of them would sell his share of stock for just what it had cost him. Mr. Davis and I agreed between us to buy their stock, and bought it, for just what I supposed it had cost them.

(Mr. PUTMAN: Answer is objected to because the contract between Mr. Davis and witness had nothing to do with the suit)

Q. At p. 121 Mr. Davis testifies that he offered to give you $35,000.00 for your and Dr. Sowers' stock: Is that true? A. He did, as Mr. Herbert has shown in the letter.

Q. Is that the only way in which he proposed to make the payment? A. Yes.

Q. Mr. Phillips, at p. 14, testifies that when the company
446 was formed he had a conversation with you at the Riggs House, in which you said, "I don't know what you fellows make, or whether we will come up anywhere near expectations; but if I get my money out with a good profit of six per cent. or more, I am thoroughly satisfied." Please state whether you made any such statement as that? A. I did not.

Q. When you returned from Guantanamo did you see Mr. Phillips? A. No, I did not; he was out of town, I believe. You mean from Guantanamo to Havana?

Q. Yes? A. My recollection is he was out of town; I did not see him.

Q. He testifies to making an explanation to you about the lake property upon your return from Guantanamo to Havana: Did that take place? A. It did not.

Q. At p. 24 he states that in the beginning of this matter he told you that he had an option on the property and that they would place it in the company for $25,000.00: Did he make that statement? A. He did not.

Q. What did he state? A. That they had an option on the property and the company could buy it from Madam Tarafa for the price stated.

Q. What price? A. $25,000.00 was the price.

447 Q. At p. 37 Mr. Phillips tells us that in preparing to make the purchase in Havana it was suggested by you that you all

should give your checks to Micou; that he saw no objection to it and did it: Is that correct? A. I have no recollection of any such statement. I gave my check for my portion to Micou to be paid to him when everything was found satisfactory.

Q. Were you aware that although Davis and Phillips were drawing their checks, they were not to be paid? A. I supposed they were paying for their shares, when arrangements were completed, as they were not when I left Havana.

Q. What knowledge, if any, had you, or suspicion, that they were drawing checks to the order of Micou which were not in future to be used? A. I never had any knowledge or suspicion that they were doing it.

Q. Mr. Phillips states at p. 54 that you were basing your objection to Herbert and Micou getting stock when you were getting none on the fact that you could not afford to have it appear that Micou was getting stock when you were not and that for the looks of things you could not go into it: When did you first hear of such a proposition as that? A. When Phillips testified about it here in Washington.

Q. Did any such thing occur? A. Nothing of the kind.

Q. At p. 58 he testifies that he may have told you that the mortgage did not really belong to Escalante: Is that true? A.
448 It is not.

Q. And, on the same page, that he may have told you that Escalante was not the owner of the mortgage: Did he ever tell you that? A. He did not.

Q. He further states, at p. 60, that when you came back from Guantanamo he explained to you about the $1,000.00 for the lake land and about the censos—to quote exactly: "I explained to General Reid, as well as I remember, when he came back, the exact condition of it:" What explanation, if any, did he ever give you when you returned? A. None whatever.

Q. Where was he when you returned? A. My recollection is he was out of Havana; I don't know where.

Q. Did you see him in Havana after your return? A. To the best of my recollection I did not see him after my return from Guantanamo; before I left Havana at that time.

Q. When did you next see him in Havana? A. I don't remember seeing Phillips in Havana until my visit to Havana with you in April or May; April, I think.

Q. Of this year? A. Of this year.

Q. Mr. Phillips testifies that after the sale of his stock to you and Mr. Davis he acquired seven other shares from Davis and that he afterwards wrote you a letter about it telling you of the transfer of the stock: Is that correct? A. I don't remember ever receiving any such letter.

449 Q. Is that as definite as you can put it? A. I had understood that Davis or that Phillips had claimed to have seven shares of stock.

Q. When did you first hear of that? A. Very shortly after you

nd I went to Havana in April and when in Havana he told me that e still had seven shares of that stock.

Q. Prior to the institution of this suit what knowledge had you at seven shares, or any other number of shares had been acquired y Phillips? A. None.

Q. At pp. 71-72 Phillips states he offered to sell you these seven hares in Havana: When was that? A. If he made any such offer could only have been when we were there together; when he came o the Hotel, in April, when he told me he held seven shares of stock. have no recollection of any such offer.

Cross-examination.

By Mr. PUTMAN:

X Q. General, you have been shown a letter dated December 8, 1905, and addressed by Charles T. Phillips to Col. Herbert: When did you first see that letter? A. I can only say it was t a meeting of the board of directors that Col. Herbert presented it.

450 X Q. Was that the first time you had heard of that letter? A. That I cannot say. I have no recollection of having heard of it before that time.

X Q. Is there any way you can fix the date of the meeting at which Col. Herbert presented it? A. No.

X Q. How long after the date of the letter of December 28, 1905? A. I cannot say.

X Q. Can you tell us what Col. Herbert said about the letter, if it was produced? A. Nothing except to bring to the notice of Dr. Bowers and myself what Mr. Davis proposed.

X Q. Did he at that time call your attention to the fact that he was invited to examin- a written agreement signed by Phillips, Davis and Herbert and Micou in my possession? A. I don't think Mr. Herbert said anything about that.

X Q. You have testified that Phillips and Davis made another offer than the one contained in this letter for your interest in the property. Are these two offers the only offers that Phillips and Davis made? A. They are the only offers they made to me.

X Q. You don't include any offers that may have been made through your counsel, Mr. Darlington? A. I think that is the other offer referred to. I think Mr. Davis left it with Mr. Darlington, either Mr. Davis or his attorney.

451 X Q. And that is the other offer to which you refer? A. I think that is it.

Cross-examination by Judge NORTON:

X Q. General, you hold a majority of stock in the company? A. I do. I hold 74/150ths. Ten of these 150 shares of stock are in the treasury. I hold 74/140th- of the issued stock.

X Q. The shares are $1,000.00? A. $1,000.00; yes.

X Q. Who holds the other stock, General? I don't mean in de-

tail, but just the names? A. Davis, Sowers, Herbert, Frank A. Kane and George Conrad Reid.

X Q. Does the Micou who has been referred to own any? A. No, he has transferred all his stock.

X Q. The Herbert you referred to is Hilary A. Herbert, Secretary of the Navy at one time? A. Ex-Secretary; yes.

X Q. The Micou you referred to is his son in law and partner? A. Yes, sir.

X Q. Micou was one of the men active in the beginning of this company; was he not?

(Mr. DARLINGTON: I object on the ground, first: that this is not rebuttal; in the second place, because all of this is already in the record. I object simply in the interest of economy of time and money.

452 (Mr. NORTON: Counsel for defendants says he will pay for the extra time if counsel for complainant will allow the examination to go on.

(Mr. DARLINGTON: I must object to any questions that are not properly in rebuttal; at least if there are very many of them.)

X Q. When was the property first brought to your attention, General? A. When Davis and Phillips came up from Havana, about the first of January, 1904.

X Q. And when did you enter into any contract relation about it? A. Sometime during January, 1904, we agreed to take stock in a company formed for the purpose of buying the property.

X Q. Was that agreement a final one or were you to look at the property first? A. We were to look at it first.

X Q. And in March, 1904, you went and looked over the property? A. We did.

X Q. And I believe you said something about March, 1905, the negotiations were finally concluded and the company formed? A. The negotiations were finally concluded and the company formed in May or June, 1904; shortly after we went to look at the property.

X Q. Did you go over the property, General, when you first went down there? A. Yes; quite extensively.

453 (Mr. DARLINGTON: I object on the ground that this is not rebuttal, but a useless reiteration at this stage of the case, of testimony already fully gone into and appearing in the record; and if any more questions of this character are asked I shall feel it my duty to instruct witness not to answer.

(Mr. NORTON: Counsel forgets evidently that he just asked this witness about his trip to Havana and going out personally to see this property in March, 1904.)

X Q. You inspected the property, General?

(Mr. DARLINGTON: You can answer, General.)

A. I rode over the property in company with a number of other people for at least six or seven hours.

X Q. You could have taken as many days to inspect the property if you desired, could you not, General? A. No.

X Q. Why not? A. Because I had to go on to Guantanamo.

X Q. You could have come back, could you not, and looked over it? A. I had to return to Washington and make my report.

X Q. You were satisfied with the inspection? A. In regard to the land?

X Q. Yes? A. Yes.

X Q. You say you had a power of attorney from Mr. Davis to represent him in the board of directors meetings: Did you vote on that power of attorney to bring this suit against Davis? A. I did not. I never had occasion to use that power of attorney, be-
454 cause there was never any division among the board of directors in voting.

X Q. Who was present at the meeting when this suit was authorized? A. Mr. Herbert, Dr. Sowers and, I think, my son, Mr. Kane and myself—the books will show.

X Q. After you had made your trip, General, and seen the property and then came back to Washington the final agreement about forming a company was entered into, was it not? A. Yes, sir.

X Q. You naturally wouldn't have gone into a thing until you had seen something about. I mean you wouldn't have gone into the thing until you had seen the land and knew something about it? A. That was the understanding.

X Q. That you should see the land before the thing was finally settled? A. Yes sir.

GEO. C. REID.

Sworn to before me as aforesaid and subscribed, this 29" day of December, A. D., 1906.

T. H. FITNAM, *Examiner.*

455 Met, Monday, December 31, 1906, at 12/30 o'clock p. m. No. 410 Fifth street, northwest, pursuant to arrangement between counsel, made since last adjournment. Present, Mr. J. J. Darlington, for complainant, and Mr. S. A. Putman, for defendants; whereupon, the following proceedings took place:

(Gen. Reid produces the paper—the Davis proposition—called for by defendants' counsel at the last session, which is in the words and figures following:

THE RALEIGH, EUROPEAN PLAN,
WASHINGTON, D. C., *August* 18, 1905.

Mr. J. J. Darlington, Washington, D. C.

DEAR SIR: For sometime there has been a lack of harmony among the Directors of the Las Ovas Company. Gen'l George C. Reid holds about 52% of the stock of this Company and I hold about 35% of said stock and am, therefore, in the minority. I came to the conclusion several months ago that it would be best for all parties concerned for either Gen'l Reid or myself to buy all of the stock of this Company. I therefore make to you, as Attorney for Gen'l George O. Reid and Dr. Z. T. Sowers, the following proposition:

Estimating the cost of their stock, which I can only do in view of the fact that the books of the corporation are at present inac-

cessible, at $275 a share—I will give to them that amount per share for the 82 shares held by them, payable as follows::

$5000 in two years; $5000 in three years and $12550 in four years, at 6% annual interest. I will secure the payment of same by transferring all of the stock of the Company as collateral, or by giving a mortgage on the property with the condition that in case any land is sold, the mortgage will be canceled proportionately.

If this is not satisfactory, I will in view of the fact that I am in the minority, sell the 49 shares of stock held by me at $225 per share, payable on the same terms.

The above propositions are on the condition that you give me a prompt answer through my Attorney, Samuel A.
456 Putman.

NORMAN H. DAVIS.)

(Mr. Putman thereupon produces a letter from himself addressed to Mr. J. J. Darlington, April 10, 1906, and states that he presented this letter to Mr. Darlington on or about its date, offering to purchase the shares of Gen. George C. Reid, Dr. Sowers, Conrad Reid and Mr. Kane, amounting to 82 shares, and the 10 shares formerly held by Ricks & Parker, if the latter shares were not then in the treasury of the company, for the sum of $34,000, to be paid in cash in sixty days from the acceptance of the proposition, and the balance in equal payments in one and two years from that date with interest at 6 per centum per annum, secured by first mortgage upon the property exclusive of the censos, the suit to be dismissed when cash payment was made, each party to pay their own costs, *et cet.*, as will more fully appear from the *the* said letter, which it is agreed the examiner may copy into the Record at this point.

(Mr. Putman further states: Mr. Darlington declined to submit the proposition, stating that Gen. Reid and Dr. Sowers had informed him they would entertain no proposition which did no- involve the immediate repayment of their money and the discontinuance of any further relations with the defendants.

(Mr. Darlington adds: Please state that Mr. Darlington adds that he has no recollection of any such letter or proposition. He does remember that he had been instructed by Dr. Sowers and Gen. Reid that they would entertain no proposition which did not involve an immediate and complete settlement, without further relations with the defendants; and further that he himself could not have recommended a settlement which involved dismissal of the suit upon the payment of $10,000, requiring Gen. Reid and Dr. Sowers or the complainant to go to Cuba for further relief if the deferred putchase money was not paid.*

*See following page for letter in "Record at this point.")

457 (Letter in "Record at this point:"

WASHINGTON, D. C., *April* 10, 1906.

Mr. J. J. Darlington, City.

DEAR SIR: Inasmuch as my proposition of yesterday in behalf of my client, Mr. Norman H. Davis was indefinite as to the amount of

its terms, I am instructed by him to make you the following proposition:

Mr. Davis will purchase from General Geo. C. Reid, Dr. Sowers, Conrad Reid and Mr. Kane the 82 shares of stock of the Las Ovas Company now held by them and the 10 shares formerly held by Ricks & Parker, if those shares are not now in the Treasury of the company, for the sum of $34,000 to be paid as follows:

$10,000 in sixty days from the acceptance of this proposition and the balance in equal payments in one and two years from that date with interest at 6 per centum per annum, secured by a first mortgage upon the company's property exclusive of the censos referred to in the bill and answer in the suit now pending; the suit to be dismissed when the cash payment is made, each party other than the Las Ovas Company to pay their own costs of the litigation and Reid and Sowers to pay the counsel fees and taxable costs incurred by the company in said litigation, the said Geo. C. Reid, Sowers, Conrad Reid and Kane to execute a release of all claims against the said Norman H. Davis, Charles T. Phillips and the Las Ovas Company when the cash payment is made and to discharge all outstanding obligations of the company created by or with the knowledge of the said Reid, Sowers, Reid and Kane.

Very truly yours,

SAMUEL A. PUTMAN.

Testimony on behalf of complainant announced closed.

T. H. FITNAM, *Examiner.*

458 *Stipulation Las Ovas.*

In the Supreme Court of the District of Columbia.

Equity. No. 25622.

THE LAS OVAS COMPANY, Complainant,

vs.

NORMAN H. DAVIS ET AL., Defendants.

It is hereby stipulated by counsel for the several parties hereto that the statements herein made appear in the books records and papers of the complainant Company and that, at the hearing of this cause, they may be read in evidence on behalf of the defendants.

J. J. DARLINGTON,
Solicitor for Complainant.
SAML. A. PUTMAN,
Solicitor for Defendants.

459 *Copies from By-laws, Etc.*

Filed February 3, 1909.

1. The said company's certificate of incorporation was signed May 13, 1904, by George C. Reid, Hillary A. Herbert, Benj. Micou, Norman H. Davis, Z. T. Sowers and Theobald J. Talty.

2. These by-laws were in force from May 22, 1905, until after the commencement of this suit.

Stated meetings of the Board of Directors shall be held on the third Tuesday of every month, and special meetings may be called at any time by the President, or in his absence by the next officer present, who shall call such meetings whenever requested thereto in writing by two of the Directors. If he should refuse, or fail to do so, then any two Directors can call the meeting.

The Board of Directors shall have the power to buy and sell real estate and personal property, to constitute and accept and cancel mortgages, to develope property not belonging to the company, to appoint attorneys in fact, solicitors representatives for the benefit of the company, to invest the funds of the company as they may deem proper, and generally to do any other act or acts granted to the company in its charter of incorporation, or any other act or acts touching the interests of the company.

The President shall preside at all meetings of the Board
460 of Directors, or in his absence, the next officer present. He shall for the Board of Directors sign all certificates of stock, bonds, promissory notes, deeds, releases, execute the acceptance and cancellation of mortgages, powers of attorney, conveyances, contracts and other instruments necessary to carry on the business of the company, and countersign all checks and drafts. He shall further perform generally all other duties incident to the position of Chief Executive Officer of the Company, or required by law.

3. At an adjourned meeting of the Board of Directors from a special meeting called for May 23, 1905, there were present George C. Reid, Conrad Reid, Z. T. Sowers and Kane and a resolution was adopted authorizing Gen. Reid to consult counsel in regard to the matters involved in this suit. This meeting was adjourned sine die.

4. At a special meeting of the Board of Directors Thursday, June 28, 1905, there were present Hillary A. Herbert, George C. Reid, Z. T. Sowers and —— Kane and the following resolution was adopted:

Whereas from the statements contained in a report from Runcie & Lamar, Attorneys for the Las Ovas Company, in Cuba, and from statements contained in a letter from J. J. Darlington, Attorney at Law, who has examined into the facts as they appear regarding the transactions connected with the purchase of the land belonging to the Las Ovas Company in Pinar del Rio, Cuba, certain irregularities appears to have occurred to the detriment and loss of the said
461 Las Ovas Company, therefore,

Be it resolved, that the Secretary and Treasurer of said Company be, and is hereby authorized and directed to secure the services of Mr. J. J. Darlington, Attorney at Law, to co-operate with Runcie and Lamar, the Attorneys of the Company in Cuba, for the purpose of taking such action as they may deem necessary for the recovery of any losses sustained by the Stockholders of the Company through the irregularities above referred to.

5. Prior to May 22, 1905, and continuously until after the commencement of this suit the officers of the company were Hillary A.

Herbert, President, Norman H. Davis, Vice-President, and George C. Reid, Secretary and Treasurer. These with the addition of Z. T. Sowers, Conrad Reid and — Kane were Directors and stockholders. These persons were the only stockholders.

6. The following are copies of the accounts of moneys paid to and received from the company, as shown by its books, by George C. Reid, Z. T. Sowers, Hillary A. Herbert, Herbert & Micou, Norman H. Davis and Charles T. Phillips. Said books do not show an individual account with Benj. Micou.

462 George C. Reid.

1904–5–6.		Dr.	Cr.
Mar. 25.	His share of the first payment on the land, paid to Mr. Micou	6611.15	6611.15
May 14.	His share of the first payment on the lake addition, paid to Mr. Davis	194.45	194.45
" 25.	His share of the "expenses connected with the purchase," paid to Mr. Davis	565.33	565.33
June 22.	His assessment of $10 per share on 50 s's	500.00	500.00
Sept. 2.	His assessment of $2 per share on 50 shares	100.00	100.00
Nov. 1.	His assessment of $6 on 50 shares	300.00	300.00
1905.			
Jan. 27.	His assessment of $12 on 76 shares	912.00	912 00
Mar. 25.	His share of $17437.50 on 50 shares	9687.50	9687.50
" —.	Expenses of trip to Havana as per a/c rendered	.....	195.00
" 25.	Exchange on $18000 draft advanced	.....	45.00
May 9.	His assessment of $25 on 74 shares	1850.00	1850.00
" 20.	Due on money advanced as per C. B.	.....	395.03
" 20.	Advanced for ledger and notary fees	.....	.85
" 20.	To liability assumed on stock of C. T. Phillips, and still due	112.00	
June 5.	Advanced for stationery, see C. B.	.....	.50
Nov. 22.	Due on note from Co. ($18000)	.....	661.64
1906.			
Jan. 26.	Interest on the above at 6% to date	.....	51.99
" 26.	Other advances as per C. B. to date	.....	10.00
April 21.	Advanced on a/c Co. as per C B. to Kane	.....	10.00
" 31.	Advanced on a/c Co. trip to Havana	.....	214.00

463 Dr. Z. T. Sowers.

1904–5		Dr.	Cr.
June 22.	Assessment of $10 on 6 shares, paid	60.00	60.00
Sept. 2.	To assessment of $2 on 6 shares	12.00	
" 8.	By cash in payment of above	.....	12.00
Nov. 1.	Assessment of $6 on 6 shares	36.00	36.00
Jan. 27.	To assessment of $12 on 6 shares	72.00	
" 31.	By cash in payment of above	.....	72.00
Feb. 8.	To his share of the final payment on the land and interest	1162.50	
Mar. 3.	By cash	.....	1150.86
May 9.	To assessment of $25 on 6 shares	150.00	
" 17.	By cash in payment of above	.....	150.00
June 29.	By cash, balance due on land and interest	.....	11.64

Hilary A. Berbert.

1905.		Dr.	Cr.
Feb. 4.	To cash advanced on P. of A. to Boothe	.....	.50
May 8.	By assessment $25 on 9 shares	225.00	
" 18.	By cash in payment of above	.....	225.00
Jan. 27.	By assessment of $12 on 9 shares	108.00	
Feb. 7.	To cash in payment of above	.....	108.00

464 Herbert and Micou.

1904-5.		Dr.	Cr.
	Paid and arranged prior to Gen. Reid's election, Gen. not responsible:		
Mar., 1904.	Their share of 1st payment on land	3211.10	3211.10
" "	Their share of 1st payment on lake add	94.44	94.44
" "	Share of expenses connected with pur	361.81	361.81
	Since Gen. Reid's election to the office of treasurer:		
June 22.	To assessment of $10 on 32 shares	320.00	
July 20.	By cash in payment of the above	.....	320.00
" 20.	Advanced to pay interest due Acosta	.....	55.00
" 22.	To cash in full of amount advanced	55.00	
Sept. 2.	To assessment of $2 on 32 shares	64.00	
" 5.	By cash in paymcnt of above	.....	64.00
Nov. 2.	To assessment of $6 on 31 shares	186.00	
" 2.	By cash in payment of above	.....	186.00
Jan. 27.	By moneys advanced as per C. B	109.20	
Feb. 8.	To cash in full of account	.....	109.20
	Total Dr. & Cr. prior to Gen. Reid's election	3667.35	3667.35
	Total Dr. & Cr. since Gen. Reid's election to date, Feb. 8	734.20	734.20
Feb. 8.	Account closed. Totals to date	4401.55	4401.55

465 Norman H. Davis.

		Dr.	Cr.
	Prior to election of Gen. Reid as treasurer, Gen. not responsible:		
March, 1904.	His share of the first payment on land	1888.90	1888.90
" "	His share of first payment on lake add	55.57	55.57
" "	His share of expenses connected with pur	282.67	282.67
June 22.	To assessmcnt of $10 on 25 shares	250.00	
July 22.	By ½ of $462.50 advanced to Mendoza and Escalante, and deducted from assessment	.....	231.25
" 22.	By balance due in check for $157.50	.....	18.75
Sept. 2.	To assessment of $2 on 25 shares	50.00	
" 12.	By cash for assessment of Sept. 2nd	.....	50.00
Nov. 1.	To assessment of $6 on 25 shares	150.00	
" 12.	By cash in payment of above	.....	150.00
1905.			
Jan. 27.	To assessment of $12 on 49 shares	588.00	
Feb. 20.	By cash in payment of the above	.....	588.00
Mar. 25.	To his share of payment of land and interest	4650.00	
" 29.	By cash in payment of the above	.....	4650.00
May 8.	To assessment of $25 on 49 shares	1225.00	
" 8.	To liability assumed on stock purchased from C. T. Phillips	112.00	

466 Charles T. Phillips.

1904.		Dr.	Cr.
	Prior to election of Gen. Reid as Treasurer, Gen. not being responsible:		
Mar., 1904.	His share of 1st payment on the land	4155.55	4155.55
" "	His share of 1st payment on lake addition	122.22	122.22
" "	His share of expenses connected with pur	418.35	418.35

		Since Gen. Reid's election to the office of Treasurer:		
June	22.	To assessment of $10 on 37 shares.....	370.00	
July	22.	By ½ of $462.50, the amount of Mendoza's fee & Arellano's ½ interest.....	.....	231.25
"	22.	By balance, out of Davis' check, $157.50.....	.....	138.75
Sept.	2.	To assessment of $2 on 31 shares.....	62.00	
Nov.	1.	To assessment of $6 on 27 shares.....	162.00	
Jan.	26.	Stock transferred to Gen. Reid and Mr. Davis, due thereon by them.....	.....	224.00
Jan.	26.	Account closed. Totals to date.....	5290.12	5290.12

467 COMPLAINANT'S EXHIBIT "POWER."

Hon. Hilary A. Herbert, President. Col. George C. Reid, Sec'y and Treas.

Charles T. Phillips General Manager.

The Las Ovas Company, Incorporated, Washington, D. C.

JAN'Y 28, 1905.

I hereby appoint George C. Reid as my Power of Attorney to represent me in the meetings of the Board of Directors of the Las Ovas Company, Incorporated.

NORMAN H. DAVIS.

468 COMPLAINANT'S EXHIBIT LETTER, DECEMBER 28, 1905.

Charles T. Phillips.

Offices, Eurpedrado 1, Havana, Cuba, Fourth National Bank Bldg., 1409, Atlanta, Ga.

P. O. Box,
753 Havana,
684 Atlanta.

ATLANTA, GA., *Dec.* 28, 1905.

Mr. Hilary A. Herbert, 1419 G Street, Washington, D. C.

MY DEAR MR. HERBERT: I think it is due to both you and myself that certain points in regard to the Losovas deal be definitely cleared up, because it was through my acquaintance with yourself and Mr. Micou that the Losovas Company was formed. I feel sure that you are not cognizant of all the facts in regard to this transaction, else you would not sustain General Read in an action instigated, in my opinion, by Havana people interested and hostile to both Mr. Davis and myself, and when I have thoroughly explained the facts to you, which I will try to do in this letter, I feel sure that you will agree with me.

In the first place, before going into details, I wish to state that General Read and Dr. Sowers jointly have invested between them about $26,000.00 in Losovas; that I am authorized by Mr. Davis to offer

them for their interest $35,000.00, to be paid one-half in
469 twelve months and one-half in two years. Mr. Davis and I own 37 of the 140 shares in the Losovas, which represents very nearly one-third of the property. In guarantee of the deferred payments we would be willing to give them these shares, including the shares received from the rest of the stockholders; or we would be willing to give a first mortgage on the Losovas property payable in the form stipulated above. 6% interest would be paid on the deferred payments.

General Read at the time of going into this deal stated that if he could get 6% on his money he would be thoroughly satisfied, so the General cannot possibly, with this proposition of Mr. Davis and myself, feel that he has been in a losing proposition, and I wish further to state to you that had General Read been frank and fair to me in his statements at the time of the organization of this Company, while you were absent from Washington, we would have had the success that we anticipated. As it is, he can retire his investment of $23,000.00 with several times 6% on his money per annum.

While we did make a profit on this transaction, it was in my opinion a legitimate one, and if you will call upon Mr. Putman, our attorney, and ask him to show you the written agreement signed by Phillips, Davis, Herbert and Micou, Mr. Micou signing for your firm, you will see that whatever possible wrong could be charged to Phillips and Davis would also be made against Herbert and Micou.

For my own part, I think it would be infinitely better for all concerned for this matter to be settled out of court. While I
470 personally have very little further to lose in this transaction, having already lost a great deal of time and money in my efforts to make a success of the business on the lines first proposed, and which efforts were nullified by the failure of the Board of Directors to generously co-operate, still I hope that you will use your influence with General Read to induce him to either accept our proposition to give him and Dr. Sowers $35,000.00 or to make us a proposition in the same proportion, for the purchase of our stock.

The Losovas at the present time is employing three attorneys; Mr. Davis and I are employing another; and if this condition of affairs exists for another year the lawyers, especially the Havana one, will probably be the only ones who will benefit in this transaction.

If on receipt of this you will see General Read and advise me, I would be glad to come to Washington and settle this matter definitely. At present I have more of a personal than a financial interest in this matter, as I feel it was through my acquaintance with you that I was able to form this Company, and I would regret very much that any one, even the old General, should lose money in this Company, which even now should prove profitable.

Trusting that you have had a Merry Christmas, and wishing for you and yours a Prosperous New Year, I am,

Very truly yours, CHAS. T. PHILLIPS.

471 COMPLAINANT'S EXHIBIT "ITEMIZED STATEMENT."

Statement covering the purchase of land in Cuba.

1.

	Amount to be paid.	Amount paid in.	
Col. Reid	$13,222.30	$6,611.15	Each stockholder's share of the $17000 first paym't on the land, paid on a basis of 90 shares.
Phillips	8,311.16	4,155.58	
Micou	6,422.26	3,211.13	
Davis	3,777.80	1,888.90	
Billings	2,266.68	1,133.34	
Total	$34,000.00	$17,000.00	

$500.00 for lake advanced by Davis.

2.

	Amount to be paid.	Amount paid in.	
Col. Reid	$388.88	194.44	Paid by N. H. Davis and afterwards paid to him by the stockholders.
Phillips	244.44	122.22	
Micou	188.88	94.44	
Davis	111.12	55.56	
Billings	66.66	33.33	
Total	$1,000.00	$500.00	

3.

Expenses Incurred.

Col. Reid	$565.33	Amount each stockholder was assessed to pay for the items immediately following.
Phillips	418.35	
Micou	361.81	
Davis	282.67	
Billings	67.84	
Total	$1,696.00	

4.

Expenses Paid.

Abbott (Surveying)	$650.00	Paid by Mr. Davis and afterwards paid by the stockholders to him.
Bullard (Report on property)	100.00	
Transfer tax	246.00	
Register	100.00	
Romaguera (Commission on land)	600.00	
Total	$1,696.00	

5.

472 *Amount Due.*

Col. Reid.....	194.44	Lake.
	565.33	Expense.
	$759.77	
Phillips.....	122.22	Lake.
	418.35	Expense,
	$540.57	
Micou.....	94.44	Lake.
	361.81	Expense.
	$456.25	
Davis.....	55.56	Lake.
	262.67	Expense.
	$338.23	
Billings.....	33.33	Lake.
	67.84	Expense.
	$101.17	

Gen. Reid's share, $6611.15, of first payment on the land was made by cheque on Guardian Trust Co., Cleveland, Ohio, given to Mr. Micou in Havana as Gen. Reid was about leaving that city & before the title had been examined or deeds to any one made out, with instructions to Micou not to pay in Gen. Reid's portion of the purchase money until the title to the land clear & free from encumberance of any kind. Micou got the cheque cashed in Havana & paid for Gen. Reid- share in cash but does not know to whom he made this payment. Gen. Reid paid his portion of amounts mentioned in items 2 & 3 to Mr. Norman H. Davis on presentation by Mr. Davis of an itemized account covering same & representation by him that he had paid the amounts as mentioned on acc't of the stockholders.

473 Though no mention, or intimation was made by Mr. Davis nor Mr. Micou at that time that Mr. Escalante was in any way con-ected with the purchase of the property, it now turns out that the items of expense referred to were incurred in connection with the transfer of the property from Mdm. Acosta to Escalante Davis represented that, in making these payments, he had acted for the stockholders. Mr. Micou is presumed to have also paid his share of this Davis acc't though he must have known at the time that such expense was not connected with his purchase of the property from Escalante even tho' he does state that he did not know he was buying the property from Escalante, & supposed he was buying it for the stockholders from Mdm. Acosta.

474 *Opinion of the Court.*

Filed Feb. 3, 1908.

Equity. No. 25622.

THE LAS OVAS COMPANY, a Corporation,
vs.
NORMAN H. DAVIS and CHARLES T. PHILLIPS.

The bill in this case, filed by the Las Ovas Company, a corporation under the laws of the State of Virginia, seeks to recover from the defendants Davis and Phillips, certain secret profits made by them in connection with the purchase of land by said corporation and to compel the surrender by Davis of certain stock in said corporation which he acquired in the promotion of the enterprise.

It is unnecessary to set out *in extenso* the bill or the answers of the two defendants. The following facts are established by the testimony: In the latter part of December, 1903, or early in January, 1904, the defendants Davis and Phillips secured an option on about four thousand acres of land in Cuba belonging to Madam Acosta, who was the widow of one Tarafa, for $10,000. The defendants were at that time residents of Cuba. In December, 1903, Davis and Phillips met Mr. Benjamin Micou in Havana and told him of this property. Davis, Phillips and Micou met in Washington in January, 1904. Through the latter, the defendants were introduced to General Reid. The latter became interested in the land project and as a result of negotiations between the parties, an understanding
475 was reached which was embodied in a memorandum of agreement between the parties early in February, 1904. The substance of this agreement is that a corporation was to be organized for which Messrs. Phillips and Davis and Messrs. Herbert and Micou were to acquire the tract of land of four thousand acres already referred to for the sum of $25,000 and forty per cent. of the stock of the Company, the said Company to have a Capital Stock of $150,000, forty per cent. of which, or $60,000, in stock was to be given to Phillips and Davis and Herbert and Micou as compensation for securing the land and the preliminary work of getting up and incorporating the Company afterwards to be organized; the remainder of the $150.000 of stock, viz: $90,000, was to be disposed of to the subscribers thereto for one-third of its face value, or $30,000; $25,000 of this money to go to the purchase of the land and $5,000 to be used as an expense fund as directed by the Company for the purpose of effecting sales of the lots into which the four thousand acres should be divided; this $90,000 worth of stock was to be taken by the subscribers at one-third of its face value upon the following terms: one-half payable down and the other half payable if necessary at the end of twelve months from the date of subscription.

Prior to entering into this agreement and on the 4th day of February, 1904, Davis, Phillips and Herbert & Micou, acting through Mr. Micou, had entered into an agreement as follows:

"Whereas there is now under consideration the organization of a corporation to acquire, develop and dispose of land in Cuba
476 for orange growing and other purposes, and the parties to this agreement, who purpose being stockholders in said corporation, have agreed or will agree with the other proposed stockholders of said corporation to acquire for and to deliver to the corporation when organized, for $25,000 some 4000 acres in land, part of what is known as the Las Ovas tract in Pinar del Rio Province, Cuba, and whereas Charles T. Phillips and Norman H. Davis have an option on this land for $15000, it is hereby agreed between Charles T. Phillips and Norman H. Davis as parties of the first part and H. A. Herbert & Benj. Micou, under the firm name of Herbert & Micou, as parties of the second part, that any sum in excess of $15000, paid for this land by the corporation or the subscribers to its capital stock shall be divided as follows: ¾ to be divided between the two parties of the first part and ¼ to go to the parties of the second part. Should the parties to this contract take stock in the Corporation instead of money for the whole or any part of the excess over $15000 to be paid by the corporation for this land, then that such stock is likewise to be divided ¾ between the parties of the first part and ¼ to the parties of the second part. Agreed upon this 5th day of February, 1904.

NORMAN H. DAVIS.
CHAS. T. PHILLIPS.
HERBERT & MICOU,
By BENJ. MICOU."

Subsequently General Reid went to Cuba, made an examination of property in connection with the defendants and the determination was reached to increase the amount of land to be pur-
477 chased; and another agreement dated at Havana on March 19, 1904, was signed by Phillips, Davis, Reid and Herbert & Micou, partners, by Benjamin Micou. This recites that the parties last named agree to purchase a tract of land in Cuba containing five thousand acres, more or less, the property of the widow Tarafa; that they will acquire this tract of land for the formation of a Company to be organized, for the sum of $34,000, half cash, and the other half in twelve months and forty per cent. of the stock of the Company to be formed. The Company is to have a capital stock of $150,000, forty per cent of which, or $60,000 worth of stock, is to be divided equally between signers of this contract, *i. e.*, Reid to have $15,000, Herbert & Micou $15,000, Davis $15,000, and Phillips the same amount; the remainder of the $150,000 of stock to be subscribed for by the persons signing the agreement in proportion to the amount of shares subscribed.

The testimony further shows that this last named agreement was subsequently modified by adding additional land to be purchased from the widow Tarafa at an increased price of $1,000, making the total purchase price at which the land was turned into the Company, $35,000.

There is no dispute in the testimony that while the original option which had been obtained by the defendants Davis and Phillips had been cancelled, they had at the time this last agreement was entered

into, made a contract for the purchase of the property from the widow Tarafa for the sum of $20,000. There is also no contest in the evidence upon the proposition that the transaction was closed upon this basis, namely, a sale by the widow Tarafa to the
478 defendants Phillips and Davis for the sum of $20,000 and a resale to the Company for the sum of $35,000. This was accomplished in the following manner: The widow Tarafa conveyed the property to one Escalante, who was an employee of the defendants Phillips and Davis, or at least one of them, the deed to him reciting a consideration of $20,000. The latter in turn made a deed to Mr. Micou, the deed reciting a consideration of $35,000 and Mr. Micou subsequently transferred the property to the Company for the same consideration. It does not admit of discussion from the testimony that the fact that Phillips and Davis, had obtained the property for one price and turned it over to the Company for another, was unknown to General Ried, who furnished substantially all the money for the cash payment upon the property, through his contribution to the capital stock of the Company, until some months later when, in Cuba, he examined the deeds and found the discrepancy in the considerations. It is unnecessary to set out in detail the means used by Phillips and Davis to conceal this fact from General Ried. Neither denies in his testimony that he did not intend to reveal this fact to General Ried or to the plaintiff.

Two objections were urged by the defendants to the maintenance of the suit, which will be disposed of before deciding the principal questions involved. The first is, that the suit was instituted without authority from the plaintiff corporation. It appears from the record that by the by-laws of plaintiff, its president is authorized to "perform all * * * duties incident to the position of Chief
479 Executive Officer of the Company." It further appears that at a meeting of the Board of Directors of plaintiff held Thursday, June 28, 1905, Hillary A. Herbert, its president, being present, a resolution was unanimously adopted directing the Secretary and Treasurer to employ counsel to take action with reference to the subject matter of this litigation. All of the directors were present at this meeting excepting Conrad Ried (the son of the principal shareholder of the Company) and the defendant Davis. It is objected that this meeting was irregularly called for the reason that it was a special meeting of the Board and that Davis had no notice of it. But it appears that Davis was at the time in Cuba, and that before leaving Washington he had, under date of January 28, 1905, given George C. Ried authority to represent him at the meetings of the Board. While it is true that a director cannot legally delegate his powers and duties as director, this written instrument was surely a waiver of notice on Davis' part. Under the circumstances he was estopped to allege, as to any action of the Board taken in his absence, that he had no notice of the meeting. There is, moreover, another reason for sustaining the authority to bring the suit. By the by-laws, heretofore quoted, the President of the Company was its Chief Executive Officer. He was present at the meeting and voted for the resolution authorizing the institution of the suit. He could have

directed it without the intervention of the Board. "Managing officers and agents of corporations have power to employ attorneys and counselors to prosecute or defend suits for the corporation, or
480 otherwise to assist in legal proceedings in which it is interested, without any express delegations of power so to do, or any formal resolution of the Board of Directors to that effect."

10 Cyc., p. 928, note 8. *b.* and cases cited.

It was next objected that the uncontradicted evidence disclosed a defect of parties in that Mr. Micou, or the partnership of Herbert & Micou, should have been joined as defendants. This contention was based upon the written contract of February 4, 1904, between the defendants and Herbert & Micou, whereby the latter acquired a one third interest in the secret profits of the promoters. Undoubtedly Herbert & Micou would have been proper parties defendant, and, under the Equity practice as it existed in England prior to the adoption of the 32nd order of August, 1841, would have been necessary parties. This order, however, which is substantially Rule 51, of the Rules of Practice adopted by the Supreme Court for the Courts of Equity of the United States, renders it possible for a plaintiff who has a joint and several demand against several persons, to proceed against one or more of the persons severally liable. What may be the result to the plaintiff in electing to pursue his several remedy against the defendants is a matter for subsequent consideration.

The first of the principal questions raised by the record is: Are the defendants liable to the plaintiff for the undisclosed profits which they made in the transaction wherein the land in question was sold to their nominee for $20,000 and turned over to the plaintiff for $35,000? The facts in relation to the transaction, as hereto-
481 fore stated, do not admit of controversy. The defendants secured the option to purchase the property from the owner at $20,000; they thereupon co-operated with those who, with themselves, became the stockholders of plaintiff, to purchase the same property at $35,000; carefully concealing their agreement with the owner to sell at the former figure. They entered into a written instrument with those whom they had secured as their associates in the corporation whereby it was made to appear that the cost of the property was $35,000 and that the profit of those who were the promoters was to be forty per cent. of the capital stock, and nothing more. The case differs in no respect from the celebrated English case of Erlanger *vs.* New Sombrero Phosphate Co., 3 App. Cases, 1218, wherein it appeared that a syndicate purchased the lease of an island containing phosphate and then organized a corporation to purchase the lease, obtaining from it twice the amount paid for it, and it was held that the syndicate, being the promoters of the corporation, stood in a fiduciary relation to it and were bound to make a full and fair disclosure of their interest in the property. In truth, the case under consideration is stronger than the English case, because here the defendants had not in fact purchased the property with a view to reselling it; nor had they paid anything for an option on it; but the very money which they used to pay the

owner for his conveyance to their straw-man was the money of those whom they had interested in the corporation to be formed, who supposed they were paying their funds as a part of the purchase price for a conveyance from said owner to the corporation.

482 It is an undoubted rule of law that when two or more persons associate themselves for the purpose of purchasing property, and one of them represents to the others that particular property can be bought for a designated price, which he procures to be paid by his associates, when in fact he receives a difference between said sum and a less one, he may be compelled to account for such difference without any rescission of the contract, and although the property may be worth all or more than was paid for it.

Emery *vs.* Parrott, 107 Mass., 95.

The same principal is applied against promoters of corporations, in case of any secret contract more favorable than that disclosed.

Brewster *vs.* Hatch, 122 N. Y., 349.
Pittsburg Mining Co. *vs.* Spooner, 74 Wis., 307.
Hebgen *vs.* Koeffler, 97 Wis., 313.
South Joplin Land Co. *vs.* Case, 104 Mo., 572.
Ex-Mission Land & Water Co. *vs.* Flash, 97 Cal., 610.
Burbank *vs.* Dennis, 101 Cal., 90.
Yale Gas Stove Co. *vs.* Wilcox, 64 Conn., 101; 25 L. R. A., 725.
Densmore Oil Co. *vs.* Densmore, 64 Pa., 3.
Haywood *vs.* Leeson, 176 Mass., 310; 49 L. R. A., 725.
Yeiser *vs.* U. S. Board & Paper Co., 107 Fed., 340; 52 L. R. A., 724.

As stated in one case, it is the duty of a promoter toward those who are invited to co-operate in the enterprise not only to
483 abstain from stating as a fact that which is not so, but not to omit to state any fact within his knowledge, the existence of which might in any form affect the extent or the quality of the advantages held out as an inducement.

Cortes Co. *vs.* Thannhauser, 45 Fed., 730.

The principles laid down in these cases establish the liability of the defendants to account to the plaintiff for the undisclosed profits which each received in this transaction. And inasmuch as it appears from the testimony that these profits were at least in part invested in the stock of plaintiff, under the decision in the case of Yeiser *vs.* U. S. Board & Paper Co., *supra*, it would appear equitable that to the extent that such illegal profits entered into the purchase of said stock, the latter should be turned in and cancelled by the Company.

It is next urged on behalf of plaintiff that the stock issued to plaintiff as "promoters'" stock, viz., the $15,000, which each received as part of the $60,000 stock issued in part payment for the land purchased, should also be cancelled, on the theory that defendants were trustees and acted in bad faith as such, and hence are not entitled to these shares of stock, although their participation in

this profit was fully disclosed in the preliminary agreement and subscription signed by all the subscribers. The theory upon which this claim is based is that laid down by the Supreme Court in Barney *vs.* Saunders, 16 How., 535; 14 L. Ed., 1047, and Walker *vs.* Beal, 9 Wall., 743; 19 L. Ed., 814, viz., that where trustees have acted dishonorably or fraudulently it would be inexpedient to allow them
the same compensation as if they had acted uprightly and
484 in good faith. Before deciding as to whether this principle is applicable to the facts of this case, it will be helpful to review the circumstances attending the issue, and the present holding, of this stock. At the time the final agreement and subscription was made, March 19, 1904, the understanding was that Phillips, Davis, Ried and Herbert & Micou (partners) were to turn over the land to the company for $34,000 (subsequently increased to $35,000) and forty per cent. of the stock of the corporation, *i. e.*, $60,000 which stock was to be divided between them in four equal parts. In this respect, all these parties were "promoters" and the stock taken by each was "promoters'" stock, and a profit to each for services in launching the enterprise. The fact that it was not an undisclosed or secret profit differentiates it from the transaction which has already been discussed. It was known and agreed by all the original parties to the transaction and was set forth in the prospectus, or subscription agreement. The shares which the defendants received were not as a commission for the services in securing the land for the corporation; at least, there is no evidence to that effect, and there is certainly no inference that such was the fact because the share of Ried, who had done nothing toward procuring or discovering the property was equal to that of each of the defendants. It does not seem to come within the description of a commission to the defendants for services rendered in securing the land. Nor is it true, in the full sense of the term, that promoters are trustees of the corporation to be formed. As stated by Judge Thompson in his
485 work on Corporations, Par. 8284: "The fact that a promoter may purchase with his own money, property with the intention of selling it to the corporation at a profit, does not make the property that of the corporation in equity; in other words, he does not hold as trustee for the corporation. It is his property; but when he undertakes to sell it to the corporation, he is charged, as its fiduciary, with the duty of making a full and fair disclosure of what he gave for it." And in Par. 8287, it is stated: "As in the case of directors, the thing which the rule condemns is the taking of *secret* profits by the promoter from the corporation which he promotes. It does not inhibit the taking of *open* profits." In the case of McElhenny's Appeal, 61 Pa. St., 188, which was a case in which a promoter was charged with secret profits, the Court uses this language: "It is not damages in a case like this that Equity gives, it is restoration of the thing wrongfully taken, namely, the money received, or an equal sum and interest."

Moreover, in all the cases which I have examined, in which promoters have been compelled to disgorge secret profits, they have been given credit for all legitimate and necessary expenses incurred

by them in securing the property for the company or in organizing the corporation. See Haywood *vs.* Leeson, *supra*. In the well known case of the Emma Silver Mining Co. *vs.* Grant, 11 Law Reports Ch. Div., 918, where Grant was held liable for the amount of secret profits which he had made, it was also held that in estimating the amount of such profit he was entitled to be allowed all sums *bona fide* expended in securing the services of the directors and providing their qualifications, and in payments to brokers and officers
486 of the Company and to the public press in relation to the Company. These rulings negative the idea that the Court, in compelling the promoter to surrender secret profits, has the right to penalize or fine him for his misconduct, which would be the result of forcing him to surrender stock or money legitimately received in connection with the transaction.

It should also be remembered that all of the present stockholders of plaintiff, who hold their stock by reason of subscription to the Company, took with full knowledge of defendants' title to this "promoters'" stock. These stockholders are as follows: General Geo. C. Ried seventy-six shares (one each being held by Kane and Conrad Ried); Hilary A. Herbert nine shares; Davis 40 shares; Dr. Sowers six shares, and ten shares in the treasury. It therefore appears that all the present stockholders, (excepting Dr. Sowers, who according to the testimony purchased through Davis' individual misrepresentations) were participators with defendants in the divison of this $60,000 of promoters' stock. It does not appear equitable that these shareholders should retain their gratuitous stock and that defendants should surrender theirs, simply because defendants made an additional and undisclosed profit above that which their associates made in the transaction. It seems to me that the demands of equity, under all the circumstances, will be subserved by requiring defendants to surrender their secret profits not participated in by their associates.

The conclusions reached may be summed us as follows:

1st. The defendants shall sever all account for that portion
487 of the secret cash profit which each received, said profit being the difference between the amount paid to the widow Acosta and that paid by plaintiff for the land in question, with interest from the date of the receipt of such profit, less such amounts, if any, as each may have necessarily paid out in securing said land, or in forming such corporation.

2nd. The plaintiff may follow said amounts so received, in so far as they went into the stock of said company, or may have a money judgment therefor, as it may elect. If the election is to follow said profits into said shares, the latter shall be delivered up and cancelled.

3d. The defendants will not be required to surrender up for cancellation, the shares of stock which they received under the written prospectus or subscription agreement, as "promoters'" stock.

4th. The cause will be referred to the Auditor to ascertain the net amount of secret profits received by each defendant and the proportion thereof which was invested in the stock of plaintiff now held by either of them.

ASHLEY M. GOULD, *Justice.*

Memorandum.

March 8, 1908.—Cause referred to Auditor.

Auditor's Report.

Filed November 25, 1908.

In the Supreme Court of the District of Columbia.

Equity. No. 25622.

THE LAS OVAS COMPANY
vs.
NORMAN H. DAVIS ET AL.

This cause is referred to me to ascertain and report the amount of secret profits received by the defendants, Norman H. Davis and Charles T. Phillips, and the proportion thereof, if any, which is now represented by shares of the capital stock of the complainant held by or for the defendants or either of them. After due notice I proceeded with the reference, no further testimony being introduced by either party and the issues in the reference being argued by the counsel respectively.

The defendants, Davis and Phillips, had secured an option on land in Cuba with which they purposed to organize a Stock Company, turning the land in at an increased price over that of the option. They subsequently took in Benjamin Micou, and the option was enlarged as to the quantity of land and the price, the latter
489 being fixed at Twenty Thousand Dollars; Five Thousand payable in cash and Fifteen Thousand in one year with interest at the rate of ten per cent. At this time a written agreement was made by which it was stipulated that the sum for which the property should be sold to any proposed corporation or parties who might subscribe for stock in excess of the cost of the option, should be divided between Davis, Phillips and Micou, either in money or in stock of the proposed Company.

General George C. Reid was then taken into the scheme, it being represented to him that the cost of the land would be Thirty-Five Thousand Dollars payable one-half in cash and the balance in one year with interest at ten per cent. The Company was formed with a capital of one hundred fifty thousand dollars, divided into one hundred fifty shares of the par value of One Thousand Dollars each; forty per cent. was to be non-assessable and to be divided to Davis, Phillips, Micou and Reid equally, fifteen shares to each, as promoters stock, and ninety shares remaining to be sold at one-third of their par value or thirty thousand dollars, payable one-half at the time of subscription and the remainder in one year if needed.

The purchase of the land was completed and in order to carry out the plans of the original parties, Davis, Phillips and Micou, the land was conveyed to one Escalante who appears to have been an employee

of Phillips and Davis or one of them; this deed reciting an actual consideration of Twenty Thousand Dollars. Escalante made conveyance to Micou reciting a consideration of Thirty-Five Thousand Dollars and Micou conveyed to the Company for the same
490 consideration. In furtherance of the scheme a note for fifteen thousand dollars was executed and delivered payable in one year with interest at ten per cent., this note being the actual amount due to the vendor of the land after the cash payment of Five Thousand Dollars. At the same time another note for Two Thousand Five Hundred Dollars was made and given to Escalante, payable in one year with interest at ten per cent.; the two notes making up the alleged deferred payment of Seventeen Thousand Five Hundred Dollars.

Upon the formation of the Company the sixty shares of promoters stock was divided to Davis, Phillips, Herbert & Micou (as one) and Reid, fifteen shares each.

The ninety shares of assessable stock was allotted as follows: To Charles T. Phillips twenty-two shares; to George C. Reid thirty-five shares; Benjamin Micou or Herbert & Micou seventeen shares; Norman H. Davis ten shares; and Billings six shares.

The six shares allotted to Billings was not taken and came into possession of Davis who settled for the same from his share of the secret profits. He subsequently sold these shares to Doctor Z. T. Sowers, receiving for the same One Thousand Three Hundred Thirty-three Dollars.

General Reid was assessed on the thirty-five shares of stock held by him in the sum of Six Thousand Six Hundred Eleven Dollars for the alleged cash payment of Seventeen Thousand Five Hundred Dollars. He paid the assessment into the hands of the defendants who applied Five Thousand to the payment of the actual cash payment for the land.

On the maturity of the deferred payment for the land
491 Fifteen Thousand Dollars the actual amount was paid to the vendor and the note given to Escalante Two Thousand Five Hundred Fifty Dollars, with interest amounting to Two Hundred Fifty Dollars, was paid into the hands of the defendants who retained the same, the said note being fraudulent in character and actually held by them or in their interest.

Micou paid to the defendants the sum of Twelve Hundred Dollars on account of the assessable stock allotted to him or his firm, the remainder of the stock being settled for by his share of the secret profit.

In the Schedule herewith I have stated an account of the secret profit received in cash by the defendants, consisting of the amount retained from the payment made by General Reid, the sum received from Benjamin Micou, the proceeds of the sale of the six shares of stock to Doctor Sowers and the amount of the fraudulent deferred payment note taken by the defendants. From the aggregate I have deducted the assessments made upon the assessable stock held by the defendants or by Davis and on the balance then remaining I have computed interest, compounding the same by yearly rests.

Of his promoters stock Phillips transferred eight shares to General Reid and seven to Davis. He transferred of his assessable stock six shares to V. Q. Ricks and four shares to Harry Parker. These ten shares were sold for unpaid assessments, and purchased by the company. They are held as Treasury stock.

The remaining twelve shares of assessable stock held by
492 Phillips was transferred six to Davis and six to Reid.

Nine shares of stock were issued to H. A. Herbert, sixteen shares to Herbert and Micou and seven shares to Benjamin Micou, making thirty-two shares in all. Of this General Reid received twelve, and Davis eleven, leaving nine shares in possession of Herbert.

At this time Davis is the holder of forty-nine shares, fifteen of which were issued to him as his portion of the promoters' stock and seven of these received from Phillips represent in part Phillips' share of the promoters' stock. While counsel for complainants contend that in view of the fraudulent conditions in the case and participation of Davis therein, all of the stock now held by him, excepting his own original share of the promoters' stock, should be reported as representing secret profit, under the opinion of the Court I am compelled to hold that this seven being identified as part of the fifteen shares of the promoters' stock issued to Phillips, I cannot report the said shares as representing secret profit, and must hold that Davis took that with the same non-assessable and privileged character in which they were held by Phillips.

Counsel for Davis contend that three of the shares of stock transferred by Micou to Davis represent a part of the fifteen shares of promoters' stock allotted to Herbert and Micou, and cite the testimony of Davis taken during the progress of the suit as sufficient proof of that theory. Davis does not testify as claimed by counsel, but I do not find that a history of the stock appearing in the case corroborates this testimony. There was no separate certificate for fifteen
493 shares issued to Herbert & Micou, nine shares were issued to Herbert separately, sixteen to Herbert & Micou, and seven to Micou separately. Herbert retained his nine shares and of the remainder of the shares issued to Herbert and Micou and Micou separately, twelve shares were transferred by Micou to General Reid and eleven to Davis. The identification of the three shares in question resting solely upon the testimony of Davis who induced Reid to purchase Micou's stock, knowing all of the facts relating to the secret profit transaction of which General Reid was entirely ignorant, I feel bound to hold that the three shares of promoters' stock were included in the transfer to Reid.

Upon these conclusions I find twenty-seven shares in the possession of Davis representing secret profit.

JAS. G. PAYNE, *Auditor.*

Report of Secret Profits Received by the Defendants, Norman H. Davis and Charles T. Phillips, in the Purchase of the Land and its Sale to Complainants.

Received from George C. Reid as his share of assessments on the basis of $17,500.00 as cash payment for land	6,611.00	
Paid to vendor in full of actual cash payment	5,000.00	
		1,611.00
Received from Benjamin Micou		1,200.00
494 Proceeds of sale of six shares of stock to Dr. Z. T. Sowers		1,333.00
Collection of note given to Escalante as alleged part of deferred payment of purchase price of land	2,500.00	
Interest	250.00	
		2,750.00
		6,894.00
Less assessments paid on assessable stock held by said defendants		5,595.50
		1,298.50
Interest to August 6, 1906		77.91
		1,376.41
Interest to August 1907		82.59
		1,459.00
Interest to August 1908		87.54
		1,546.54

JAS. G. PAYNE, *Auditor.*

495 The Las Ovas Company, Incorporated.

Copy of Certificate Stubs in Certificate of Stock Book.

Certificate No. 15, for 15 shares, issued to George C. Reid, dated July 1, 1904.

Certificate No. 16, for 35 shares, issued to George C. Reid, dated July 1, 1904.

Certificate No. 17, for 15 shares, issued to Chas. T. Phillips, dated July 1, 1904. To whom transferred, Gen. Reid 8 shares, N. H. Davis 7 shares, Jan. 26, 1905. Dated Jan. 26, 1905. No. original certificate 17, No. original shares 15, No. of shares transferred 15. Transferred to Gen. Geo. C. Reid 8 shares, of this No., and to Mr. N. H. Davis 7. Original certificate cancelled. Cancelled Jan. 26, 1905.

Certificate No. 18, for 22 shares, issued to Chas. T. Phillips, dated July 1, 1904. Cancelled October 1, 1905.

Certificate No. 19, for fifteen shares, issued to Norman H. Davis, dated July 1, 1904.

Certificate No. 20, for six shares, issued to Norman H. Davis, dated July 1, 1904, Transferred to Dr. Z. T. Sowers July 1, 1904.

Certificate No. 21, for ten shares, issued to Norman H. Davis, dated July 1, 1904. Dated July 1, 1904.

Certificate No. 22, for nine shares, issued to Hilary A. Herbert, dated July 1, 1904.

Certificate No. 23, for six shares, issued to Benj. Micou, dated July 1, 1904. No. original certificate 23, original shares 6, No. of shares transferred: Reid 3, Davis 3, (6). Cancelled January 28, 1905.

496 Certificate No. 24, for one share, issued to Benj. Micou, dated July 1, 1904. Cancelled Jan. 31, 1905.

Certificate No. 25, for six shares, issued to Herbert & Micou, dated July 1, 1904. Certificate cancelled January 28, 1905.

Certificate No. 26, for ten shares, issued to Herbert & Micou, dated July 1, 1904. Cancelled January 28, 1905.

Certificate No. 27, for six shares, issued to Mr. V. Q. Ricks, Canton, Miss. dated Aug. 1, 1904. From whom transferred: C. T. Phillips, dated July 1, 1904. No. original certificate 18, No. original shares 22, No. shares transferred 6.

Certificate No. 28, for four shares, issued to Mr. Harry Parker, Tullahoma, Tenn. Dated Oct. 1, 1904. From whom transferred: C. T. Phillips. Dated October 1, 1904. No. original certificate 18, No. original shares 16, No. shares transferred 4.

Certificate No. 29, for twelve shares, issued to C. T. Phillips, dated Oct. 1, 1904. No. original certificate 18, No. original shares, 22, No. of shares transferred 10, (18, 12, 12). Received Certificate No. 18, for 12 shares, this 26th day of Jan. 1905. Transferred to Gen. Reid 6 shares, to Norman H. Davis 6 shares. Original certificate cancelled Jan. 26, 1905.

Certificate No. 30, for seven shares, issued to Norman H. Davis, dated January 27, 1905. From whom transferred: C. T. Phillips.

Certificate No. 31, for six shares, issued to Norman H.
497 Davis, dated January 26, 1905. From whom transferred: Mr. C. T. Phillips, dated January 26, 1905. No. original certificate 29, No. of shares transferred, 6, No. of original shares 12.

Certificate No. 32, for eight shares, issued to Gen. George C. Reid, dated January 27, 1905. From whom transferred: Mr. Chas. T. Phillips. No. original certificate 17, No. of original shares 15, No. of shares transferred: Reid 8, Davis 7, (15).

Certificate No. 34, for one share, issued to Geo. Conrad Reid, dated January 27, 1905. From whom transferred: Gen. Geo. C. Reid. No. original certificate 35, No. of original shares 6, No. of shares transferred 1.

Certificate No. 35, for 6 shares issued to General George C. Reid, dated January 27, 1905. From whom transferred C. T. Phillips. No. original certificate 29, No. original shares 12, No. of shares trans-

ferred: Davis 6, Reid 6, (12). Cancelled, and certificate for five shares written Jan. 31, 1905. (Note):—This is 6 of the 12 shares of common stock transferred to Gen. Reid, and Mr. Davis. The No. of original certificate is 29. One of these 6 shares Gen. Reid has this day transferred to his son Conrad.

Certificate No. 36, for nine shares, issued to Geo. C. Reid, dated Jan'y 28, 1905. From whom transferred: Benj. Micou, dated Jan'y 28, 1905. No. original certificate 26, No. original shares 10, No. of shares transferred 9. Received certificate No. 36 for nine shares this 28th day of Jan'y 1905. Cancelled, and certificate for 8 shares issued Jan. 31, 1905.

498 Certificate No. 37, for one share, issued to Norman H. Davis, dated Jany. 28, 1905. From whom transferred: Benj. Micou, dated Jany. 28, 1905. No. original certificate 26, No. original shares 10, No. shares transferred 1, Reid 9, (10). Received certificate No. 37 for one share this 28th day of Jany. 1905, Norman H. Davis.

Certificate No. 38, for six shares, issued to Norman H. Davis, dated Jany. 28, 1905. From whom transferred: Benj. Micou, dated Jany. 28, 1905. No. original certificate 25, No. original shares 6, No. shares transferred 6. Received Certificate No. 38 for six shares this 28th day of Jany. 1905. Norman H. Davis.

Certificate No. 39, for three shares, issued to Norman H. Davis, dated Jany. 28, 1905. From whom transferred: Benj. Micou, dated Jany. 28, 1905. No. original certificate 23, No. original shares 6, No. shares transferred 3. Received certificate No. 39, for three shares this 28th day of Jany. 1905. Norman H. Davis.

Certificate No. 40, for three shares, issued to Geo. C. Reid, dated Jan. 28, 1905. From whom transferred: Benj. Micou, dated Jany. 28, 1905. No. original certificate 23, No. original shares 6, No. shares transferred 3. Received certificate No 40 for three shares this 28th day of Jany. 1905.

Certificate No. 41, for one share, issued to Frank A. Kane, dated January 28, 1905. From whom transferred: Gen. Geo. C. Reid, dated January 28, 1905. No. original certificate 36, No. original shares 9, No. shares transferred 1. Received certificate No.

499 41 for one share this 28th day of Jan. 1905. Frank A. Kane.

Certificate No. 42, for one share, issued to Norman H. Davis, dated January 31, 1905. From whom transferred, Benj. Micou, dated Jan. 31, 1905. No. original certificate 24, No. original shares 1, No. shares transferred 1.

Certificate No. 43, for eight shares, issued to Gen. Geo. C. Reid, dated January 31, 1905. From whom transferred: Benj. Micou, dated Jan. 28, 1905. No. original certificate 26, No. original shares 10, No. shares transferred 9.

Certificate No. 44, for Five shares, issued to Gen. George C. Reid, dated January 31, 1905.

Complainant's Exceptions to Report of Auditor.

Filed December 16, 1908.

In the Supreme Court of the District of Columbia.

No. 25622. Equity.

THE LAS OVAS COMPANY
vs.
NORMAN H. DAVIS ET AL.

The complainant, the Las Ovas Company, excepts to the report of the Auditor filed in the above entitled cause, on, to wit, the 25th day of November, A. D. 1908, in the particulars and upon the grounds following, namely:

I. It excepts to so much of the said report as finds the defendant Davis to be the holder of seven of the fifteen shares of pro-
500 moters' stock allotted to the defendant Phillips at or in connection with the organization of the complainant company; and, for ground of exception, it shows that the said Davis purchased or acquired the seven shares of the complainant's stock from his said co-defendant, well knowing that the latter, at the same time, was selling six shares of the complainant's stock, and had already sold ten shares thereof, to innocent holders, for value and without notice, in whose hands they are valid obligations as against the complainant, making, in all, more than the total amount of his promoters' shares, and well knowing, also, and having been a participator in, the fraudulent means by which the said Phillips obtained all the shares of the said stock held by him.

And for further ground for its said exception, the complainant shows that, if the said seven shares were still in the hands of the defendant Phillips, the complainant would be entitled under the facts shown by the record in this cause to set off as against them the shares of its stock upon which he has already realized, and which he has rendered valid, outstanding obligations of the complainant by selling them to innocent purchasers for value, without notice, and it would be further entitled to have the said seven shares decreed to be delivered up and canceled, and that the defendant Davis, having purchased the said seven shares from Phillips with full knowledge of all the facts, took them subject to all the equities and rights of the complainant as against the said Phillips.

And, in further support of its said exception, the com-
501 plainant further shows that, the defendant Davis having been a co-conspirator with his said co-defendant Phillips in each and every of the frauds perpetrated by them both upon it, and through which the said Phillips obtained at least eight of the ten shares of its capital stock which he has so sold to innocent purchasers, the said Davis is equally liable with the said Phillips therefor, and is estopped in a court of equity to claim that the said eight shares,

though earlier sold, were the invalid, fraudulent shares, and that the seven shares, though those last sold by the said Phillips, were a part of the promoters' shares which came into his hands, and therefore passed as valid shares into the hands of the said Davis when the latter acquired them from the said Phillips.

II. The complainant further excepts to so much of the report as finds that the fifteen shares of promoters' stock allotted to the defendant Davis at or in connection with the organization of the complainant company, or any part thereof are valid shares held by him; and, for ground of its said exception, it shows that the consideration upon which the said fifteen shares were to be allotted to him were services to be rendered, honestly and in good faith, in and about the purchase for or on behalf of the complainant company, when organized, of the lands in Cuba now owned by it, which said services the said defendant did not render honestly and in good faith, but, on the contrary, as plainly appears upon the face of his own deposition in the cause, and upon the record, corruptly used his said position of trust and confidence at every stage of the transaction for the perpetration of gross and unconscionable frauds upon the com-
502 plainant, its representatives and stockholders for the secret and dishonest profit of himself and his co-defendant Phillips, to the great embarrassment, loss and detriment of the complainant, and to its great cost and expense, in litigation and otherwise; and that it is contrary to law, as well as to good conscience and equity, that he should claim, or be allowed, any compensation under the circumstances, and still more so that he should claim, or be allowed, the same compensation or advantage as if he had rendered the said agreed services in good faith.

J. J. DARLINGTON,
Sol. for Compl't, The Las Ovas Company.

Defendants' Exceptions to Report of Auditor.

Filed December 16, 1908.

In the Supreme Court of the District of Columbia.

Equity. No. 25622.

THE LAS OVAS COMPANY
vs.
DAVIS ET AL.

Now come the defendants Norman H. Davis and Charles T. Phillips by their solicitor- Samuel A. Putman and J. K. M. Norton and except to the report of the Auditor heretofore filed in this cause and appeal from the same and assign the following grounds of exception:

1. The report shows that the defendant Davis has twenty-
503 two shares of non-assessable or promoters' stock, while the record shows he has twenty-five shares.

2. The report shows that the Defendant Davis has twenty-seven shares of assessable stock while the record shows that he has only twenty-four.

3. The report shows that twenty-seven shares of the stock held by the defendant Davis are assessable shares and represent his secret profit while the record shows that the Auditor has included in said twenty-seven shares three shares *which* the promoters' or non-assessable, eight shares which said defendant bought from Benjamin Micou or Herbert & Micou and six shares which he bought from the defendant Phillips.

4. The report shows that the said twenty-seven shares represent the secret profit of the defendant Davis while the record shows that the defendants paid a large sum of money into the treasury of the complainant company as assessments or payments for said shares of stock.

5. The report does not give defendants credit for large sums of money shown by the record to have been paid by them as expenses in the organization of complainant company, and for which they have never been reimbursed.

Wherefore, defendants pray that said report be not ratified and confirmed.

SAM'L A. PUTMAN,
J. K. M. NORTON,
Solicitors for Defendants.

504 *Final Decree.*

Filed February 24, 1909.

In the Supreme Court of the District of Columbia.

No. 25622, Eq. Doc. —.

LAS OVAS COMPANY, INCORPORATED,
vs.
NORMAN H. DAVIS and CHARLES T. PHILLIPS.

This cause coming on to be heard upon the exceptions of the complainant, and of the defendants, to the report of the Auditor herein, and for final decree, and having been argued by the solicitors for the respective parties and duly considered, it is thereupon by the court this 24th day of February, A. D. 1909, adjudged, ordered and decreed as follows:

1. That the exceptions of the complainant, and of the defendants, to the said report of the Auditor, and each and every of them, be, and the same hereby are, overruled, and that the said Auditor's report be, and the same hereby is, finally approved, ratified and confirmed.

2. That the defendant Norman H. Davis be, and he hereby is, adjudged, ordered and decreed to surrender into the Registry of the Court for cancellation, within thirty days from the date of this de-

cree, Twenty-seven (27) of the Forty-nine (49) shares of the capital stock of the complainant Company now held by him, the said shares, when so surrendered, to be delivered to the complainant for cancellation as prayed in the bill, and that the defendants do further, within the said thirty days, pay to the complainant, or into the Registry of the Court for it, the sum of Fifteen hundred and forty-six and 54/100 ($1,546.54) dollars, with interest from the 25th day of November, 1908, the date when the said report was filed, until paid, the said Fifteen hundred and forty-six and 54/100 ($1,546.54) dollars being the amount of secret profits found by the said report to have been realized by the defendants over and above the sums of money paid by them as assessments upon the assessable stock of the complainant Company, and for which the said defendants are accountable to the complainant, with interest as aforesaid.

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3. That, upon surrender by the defendant Davis of the said Twenty-seven (27) shares for cancellation as above decreed, and upon the payment by the defendants to the complainant, or into the Registry of the Court for it, of the said sum of Fifteen hundred and forty-six and 54/100 ($1546.54) dollars with interest, as above provided, the remaining Twenty-two (22) shares of the capital stock held by the said Norman H. Davis as found by the said report be, and they hereby are, ordered, adjudged and decreed to be valid shares of the capital stock of the complainant Company, free from objection, taint or invalidity by reason of the matters and things, or any of them, in and by the bill charged against the defendants or against the said shares.

4. That the complainant recover against the defendants, and each of them, its costs in this cause, and that it have execution therefor as at law.

JOB BARNARD, *Justice.*

From the foregoing decree, the complainant prays an appeal to the Court of Appeals, which is in open court allowed, and the penalty of the appeal bond is fixed at One hundred dollars.

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And from the foregoing decree the defendant, Norman H. Davis prays an appeal to the Court of Appeals, which is in open Court allowed, and the penalty of the appeal bond is fixed at One hundred dollars.

JOB BARNARD, *Justice.*

Memoranda.

March 6, 1909.—Appeal bond (for complainant) filed.

March 19, 1909.—$100 deposited by Defendant No. 1 in lieu of appeal bond.

Directions to Clerk for Preparation of Transcript of Record.

Filed April 5, 1909.

In the Supreme Court of the District of Columbia.

No. 25622. Equity.

THE LAS OVAS COMPANY, INCORPORATED,
vs.
NORMAN H. DAVIS ET AL.

To the Clerk, Supreme Court, D. C.:

Please prepare transcript of record on the appeal of the complainant in the above entitled cause, including therein the following:

1. Bill of complaint,
507 2. Answers of both defendants,
3. Joinder of Issue,
4. All depositions and exhibits,
5. Opinion of Justice Gould,
6. Memorandum of reference to Auditor,
7. Report of Auditor,
8. Exceptions to Auditor's report filed by complainant and defendants,
9. Copies from By-Laws, etc., filed by agreement of counsel on February 3, 1909,
10. Order overruling exceptions and ratifying the report of the Auditor,
11. Memorandum of giving of appeal bond.

Respectfully submitted,

J. J. DARLINGTON,
Solicitor for Complainant.

Service acknowledged this 5th day of April, A. D. 1909.
SAM'L A. PUTMAN,
Solicitor for Defendants.

Memorandum.

May 1, 1909.—Time to file transcript of record in Court of Appeals extended to, and including, June 1st, 1909.

508 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 507, both inclusive, to be a true and correct transcript of the record

according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 25622 in Equity, wherein The Las Ovas Company, incorporated, a body corporate, is Complainant and Norman H. Davis and Charles T. Phillips are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District. this 27th day of May A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*,
By W. E. WILLIAMS,
Ass't Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 2030. The Las Ovas Company, Incorporated, appellant, *vs.* Norman H. Davis *et al.* Court of Appeals, District of Columbia. Filed May 28, 1909. Henry W. Hodges, clerk. And No. 2033. Norman H. Davis and Charles T. Phillips, appellants, *vs.* The Las Ovas Company, Incorporated. Court of Appeals, District of Columbia. Filed Jun- 8, 1909. Henry W. Hodges, clerk.

WEDNESDAY, *October* 20*th*, *A. D.* 1909.

No. 2030.

THE LAS OVAS COMPANY, INCORPORATED, Appellant,

vs.

NORMAN H. DAVIS and CHARLES T. PHILLIPS,

and

No. 2033.

NORMAN H. DAVIS and CHARLES T. PHILLIPS, Appellants,

vs.

THE LAS OVAS COMPANY, INCORPORATED.

On motion of Mr. J. J. Darlington, attorney for the appellant in No. 2030 and for the appellee in No. 2033, It is ordered by the Court that the above entitled causes be heard together.

WEDNESDAY, *December* 15*th*, *A. D.* 1909.

No. 2030.

THE LAS OVAS COMPANY, INCORPORATED, Appellant,

vs.

NORMAN H. DAVIS and CHARLES T. PHILLIPS,

and

No. 2033.

NORMAN H. DAVIS and CHARLES T. PHILLIPS, Appellants,

vs.

THE LAS OVAS COMPANY, INCORPORATED.

The argument in the above entitled cause was commenced by Mr. J. J. Darlington, attorney for the appellant in No. 2030 and for the appellee in No. 2033, and was continued by Mr. J. K. M. Norton, attorney for the appellees in No. 2030 and for the appellants in No. 2033, and by Mr. J. J. Darlington, attorney for the appellant in No. 2030 and for the appellee in No. 2033.

THURSDAY, *December* 16*th*, *A. D.* 1909.

No. 2030.

THE LAS OVAS COMPANY, INCORPORATED, Appellant,

vs.

NORMAN H. DAVIS and CHARLES T. PHILLIPS,

and

No. 2033.

NORMAN H. DAVIS and CHARLES T. PHILLIPS, Appellants,

vs.

THE LAS OVAS COMPANY, INCORPORATED.

The argument in the above entitled cause was concluded by Mr. J. J. Darlington, attorney for the appellant in No. 2030 and for the

appellee in No. 2033. On motion the appellees in No. 2030 and the appellants in No. 2033 are allowed to file supplemental brief herein if so advised.

In the Court of Appeals of the District of Columbia.

No. 2030.

THE LAS OVAS COMPANY, INCORPORATED, Appellant,
vs.
NORMAN H. DAVIS and CHARLES T. PHILLIPS,

and

No. 2033.

NORMAN H. DAVIS and CHARLES T. PHILLIPS, Appellants,
vs.
THE LAS OVAS COMPANY, INCORPORATED.

Opinion.

(Mr. Justice ROBB delivered the opinion of the Court.)

These are cross appeals from a decree of the Supreme Court of the District of Columbia. A bill was filed by The Las Ovas Company, Incorporated, to recover from Davis and Phillips secret profits made by them in the purchase by said corporation of Cuban land, and to cancel certain shares of the stock of the corporation in the hands of Davis and Phillips.

The trial court found the following facts to be established: "In the latter part of December, 1903, or early in Jan., 1904, the defendants Davis and Phillips secured an option on about four thousand acres of land in Cuba belonging to Madam Acosta, who was the widow of one Tarafa, for $10,000. The defendants were at that time residents of Cuba. In December, 1903, Davis and Phillips met Mr. Benjamin Micou in Havana and told him of this property. Davis, Phillips and Micou met in Washington in January, 1904. Through the latter, the defendants were introduced to General Reid. The latter became interested in the land project and as a result of negotiations between the parties, an understanding was reached which was embodied in a memorandum of agreement between the parties early in February, 1904. The substance of this agreement is that a corporation was to be organized for which Messrs. Phillips and Davis and Messrs. Herbert and Micou were to acquire the tract of land of four thousand acres already referred to for the sum of $25,000 and forty per cent. of the stock of the company, the said company to have a capital stock of $150,000, forty per cent. of which, or $60,000, in stock was to be given to Phillips and Davis and Herbert and Micou as compensation for securing the land and the preliminary work of getting up and incorporating the company afterwards to be organized; the remainder of the $150,000 of stock,

viz.: $90,000, was to be disposed of to the subscribers thereto for one-third of its face value, or $30,000; $25,000 of this money to go to the purchase of the land and $5,000 to be used as an expense fund as directed by the company for the purpose of effecting sales of the lots into which the four thousand acres should be divided; this $90,000 worth of stock was to be taken by the subscribers at one-third of its face value upon the following terms: one-half payable down and the other half payable if necessary at the end of twelve months from the date of subscription.

Prior to entering into this agreement and on the 4th day of February, 1904, Davis, Phillips and Herbert & Micou, acting through Mr. Micou, had entered into an agreement as follows:

'Whereas there is now under consideration the organization of a corporation to acquire, develop and dispose of land in Cuba for orange growing and other purposes, and the parties to this agreement, who purpose being stockholders in said corporation, have agreed or will agree with the other proposed stockholders of said corporation to acquire for and deliver to the corporation when organized, for $25,000, some four thousand acres in land, part of what is known as the Las Ovas tract in Piner del Rio Province, Cuba, and whereas Charles T. Phillips and Norman H. Davis have an option on this land for $15,000, it is hereby agreed between Charles T. Phillips and Norman H. Davis as parties of the first part and H. A. Herbert & Benj. Micou, under the firm name of Herbert & Micou, as parties of the second part, that any sum in excess of $15,000, paid for this land by the corporation or the subscribers to its capital stock shall be divided as follows: ⅔ to be divided between the two parties of the first part and ⅓ to the parties of the second part. Should the parties to this contract take stock in the corporation instead of money for the whole or any part of the excess over $15,000 to be paid by the corporation for this land, then that such stock is likewise to be divided ⅔ between the parties of the first part and ⅓ to the parties of the second part. Agreed upon this 5th day of Feb., 1904.

(Signed) NORMAN H. DAVIS,
CHAS. T. PHILLIPS,
HERBERT & MICOU,
By BENJ. MICOU.'

Subsequently General Reid went to Cuba, made an examination of property in connection with the defendants and the determination was reached to increased the amount of land to be purchased; and another agreement dated at Havana on Mar. 19, 1904, was signed by Phillips, Davis, Reid and Herbert & Micou, partners, by Benjamin Micou. This recites that the parties last named agree to purchase a tract of land in Cuba containing five thousand acres, more or less, the property of the widow Tarafa; 'that they will acquire this tract of land for the formation of a company to be organized, for the sum of $34,000, half cash, and the other half in twelve months and forty per cent. of the stock of the company to be formed. The company is to have a capital stock of $150,000, forty per cent. of

which, or $60,000 worth of stock, is to be divided equally between signers of this contract,' i. e., Reid to have $15,000, Herbert & Micou $15,000, Davis $15,000, and Phillips the same amount; the remainder of the $150,000 of stock to be subscribed for by the persons signing the agreement in proportion to the amount of shares subscribed.

The testimony further shows that this last named agreement was subsequently modified by adding additional land to be purchased from the widow Tarafa at an increased price of $1,000, making the total purchase price at which the land was turned into the company, $35,000.

There is no dispute in the testimony that while the original option which had been obtained by the defendants Davis and Phillips had been cancelled, they had at the time this last agreement was entered into, made a contract for the purchase of the property from the widow Tarafa for the sum of $20,000. There is also no contest in the evidence upon the proposition that the transaction was closed upon this basis, namely, a sale by the widow Tarafa to the defendants Phillips and Davis for the sum of $20,000 and a resale to the company for the sum of $35,000. This was accomplished in the following manner: The widow Tarafa conveyed the property to one Escalante, who was an employee of the defendants Phillips and Davis, or at least one of them, the deed to him reciting a consideration of $20,000. The latter in turn made a deed to Mr. Micou, the deed reciting a consideration of $35,000 and Mr. Micou subsequently transferred the property to the company for the same consideration. It does not admit of discussion from the testimony that the fact that Phillips and Davis, had obtained the property for one price and turned it over to the company for another, was unknown to General Reid, who furnished substantially all the money for the cash payment upon the property, through his contribution to the capital stock of the company, until some months later when, in Cuba, he examined the deeds and found the discrepancy in the considerations. It is unnecessary to set out in detail the means used by Phillips and Davis to conceal this fact from General Reid. Neither denies in his testimony that he did not intend to reveal this fact to General Reid or to the plaintiff."

Of the ninety shares of stock of the company remaining after the distribution of the sixty shares of promoters' stock, General Reid subscribed for thirty-five shares, Phillips for twenty-two, Micou for seventeen, and Davis for ten shares. One Billings was to take the remaining six shares. He, however, asked to be relieved from taking these shares and Davis, prior to the formation of the petitioner, sold Billings' right of subscription to Dr. Z. T. Sowers, representing to the doctor that the cost of the syndicate property was $35,000. Reid and Sowers understood that the amount paid by the latter was to be applied toward the liquidation of the syndicate's indebtedness. As a matter of fact, however, the money thus obtained was appropriated as secret profits and in no way benefited the petitioner.

Phillips sold ten of the twenty-two assessable shares held by him to outside parties, the petitioner subsequently buying these shares

which it now holds as treasury stock. By procurement of Davis, Reid purchased one-half of the twelve remaining shares, Davis taking the other half in some sort of settlement with Phillips. Of the fifteen shares of promoters' stock that went to Herbert & Micou, Herbert was given nine, which he now holds, and Micou six. In addition Micou subscribed for seventeen shares as above indicated. Upon the representation of Davis that Micou could not pay the assessment of his stock Reid was induced to purchase twelve of the twenty-three shares, while Davis purchased the remaining eleven shares. When these purchases were made Davis had full knowledge of everything that had been done, While Reid did not.

The court, in a carefully considered opinion, reached the following conclusions:

"1st. The defendants shall severally account for that portion of the secret cash profit which each received, said profit being the difference between the amount paid to the widow Acosta and that paid by plaintiff for the land in question, with interest from the date of the receipt of such profit, less such amounts, if any, as each may have necessarily paid out in securing said land, or in forming such corporation.

2nd. The plaintiff may follow said amounts so received, in so far as they went into the stock of said company, or may have a money judgment therefor, as it may elect. If the election is to follow said profits into said shares, the latter shall be delivered up and cancelled.

3rd. The defendants will not be required to surrender up for cancellation, the shares of stock which they received under the written prospectus or subscription agreement, as promoters' stock.

4th. The cause will be referred to the Auditor to ascertain the net amount of secret profits received by each defendant and the proportion thereof which was invested in the stock of plaintiff now held by either of them." The Auditor found Davis to be the holder of forty-nine shares, twenty-two of which he held to be promoters' stock and twenty-seven shares he held to represent secret profits, and that in additon there remained $1546.54 of secret profits to be accounted for in money.

The petitioner excepted to so much of the Auditor's report as found Davis to be the holder of seven of the fifteen shares of promoters' stock allotted to Phillips, also from so much of the report as found that the fifteen shares of promoters' stock allotted to Davis are valid shares held by him. Specific grounds for each exception were stated. The defendants excepted because the Auditor found Davis to be the owner of twenty-two shares of promoters' stock and twenty-seven assessable shares, instead of twenty-five shares of promoters' stock and twenty-four assessable hares.

The exceptions of both parties were overruled and decree entered in conformity with the Auditor's report. We will first consider the errors assigned by the defendants, Davis and Phillips. Their first contention is that the bill should have been dismissed because the suit was not properly authorized. This contention was urged upon the trial court. The record shows that when the resolution authoriz-

ing the bringing of the suit was passed the President of the Company and all the members of the Board of Directors save two, Davis being one, were present, and all save Davis had notice of the meeting. It is urged that this being a special meeting of the Board that Davis should have had notice. Davis, who resided in Cuba and who was there when this meeting was held, had, before leaving Washington, given Reid a power of attorney to vote for him at meetings of the Board of Directors, saying that notice of special meetings need not be sent him as he could not come here to attend them. While a director may not legally delegate his powers, we see no reason, especially where he is without the jurisdiction, why he may not waive notice; and having waived notice, as in this case, he is estopped subsequently to allege lack of notice.

The second ground for the dismissal of the bill is the defect of parties, the contention being that Herbert and Micou should have been joined as parties defendant. This contention is without merit. When the suit was instituted the complainant was without knowledge that Mr. Micou had received anything more than his share of the promoters' stock, and the answer of the defendants did not disclose that he had received anything more. It is nowhere intimated in the record that Mr. Herbert knew, or had reason to know, of his partner's participation in secret profits. Stockton vs. Anderson, 40 N. J. Eq. 486. Except in the case of indispensable parties the rule is well established that objection for want of parties, to be available, must be made early. Landram vs. Jordan, 25 App. D. C., 299-00. Moreover, Micou, on the institution of this suit, had parted with his stock, and since the decree appealed from does not charge the defendants with liability for the secret profits of Micou they are in no way prejudiced by the failure to include him as a party.

The last ground for the dismissal of the bill is that the petitioner was not competent to maintain suit for the relief sought. The defendants base this contention upon the opinion in Old Dominion Copper Co. vs. Lewisohn, 210 U. S. 206. In that case members of the syndicate acquired properties for the purpose of conveying them at an excessive valuation to a corporation they were to organize. The new company, composed entirely of themselves, was formed, every incorporator having full knowledge of all the facts. Thirteen-fifteenths of the stock of the company was held by the original incorporators, and two-fifteenths subsequently passed into the hands of innocent holders. Thereupon a bill was brought by the corporation against the estate of one of the deceased promoters, who had acted nominally as a vendor to the company of part of the property but who was really acting for the benefit of all the proposed incorporators, to rescind the sale of that portion of the property or to recover damages. A demurrer was interposed and sustained by the trial court. The Supreme Court sustained the decree on the ground that the company having "assented to the transaction with the full knowledge of the facts" its action remained binding on itself after changes in its members and an increase in its capital stock, such changes and increase not affecting its identity. The court said: "The difficulty which meets the petitioner at the outset is that it has

assented to the transaction with the full knowledge of the facts. * * * If there had been innocent members at the time of the sale the fact that there were also guilty ones would not prevent a recovery. * * * Here thirteen-fifteenths of the stock had been taken by the syndicate, the corporation was in full life and had assented to the sale with knowledge of the facts before an outsider joined." From our reading of the decision we think the defendants have misconceived its purport. As we read it, it is a reaffirmation of the doctrine that members of a syndicate to purchase property for a corporation to be formed by them stand in a fiduciary relation towards that corporation, and that they will not be permitted to make a secret profit on the sale of such property to the corporation. Yeiser vs. United Board & Paper Co., 107 Fed. 340; Loudenslager vs. Woodbury Heights Land Co., 56 N. J. Eq. 411, affirming Woodbury Heights Land Co. vs. Loudenslager, 10 Dick. Ch. Rep. 78; Erlanger vs. New Sombrero Phosphate Co., 3 Appeal Cases 1218. In the latter case the facts did not differ materially from the facts in the case at bar. There a syndicate entered into an agreement to sell at a profit to a company to be organized by the sellers, but there were innocent stockholders when the company was organized and, as the Supreme Court said in its review of the facts in its opinion in the Lewisohn case, supra, "There never was a moment when the company had assented with knowledge of the facts." So here there never was a moment when the company, with knowledge of the facts, consented to pay $35,000 for property which it should have obtained for $20,000. The complainant was, therefore, imposed upon and defrauded and, we think, entitled to maintain this suit.

We will here consider complainant's assignment of error relating to that part of the decree below allowing the defendant Davis to retain the twenty-two shares of promoters' stock now held by him. In entering upon the consideration of this question it must be remembered that this is a proceeding in equity and addressed to the conscience of the court. One of the last things which a court of equity should do is to reward duplicity or make it possible for those guilty of a fraud to reap substantial benefit therefrom.

The members of this syndicate engaged therein for the purpose of acquiring and developing land in Cuba. The defendants represented, and Reid supposed, that they were acting in good faith and advancing their pro rata share of the money necessary for the preliminary work of investigation, and later towards their pro rata share of the amount of the purchase money of the property acquired. Instead of acting in good faith, as their fiduciary relation especially demanded, they deceived and defrauded complainant by requiring it to pay $35,000 for property which had really cost but $20,000. Instead of advancing in good faith the pro rata amounts required of them in the legitimate prosecution of the enterprise they advanced nothing, and by the before-mentioned fraudulent methods obtained assessable stock of the complainant. This the court has rightly ordered cancelled. Can it be possible that equity demands that the promoters' stock which these men procured under

the conditions mentioned, and which is now in the possession of one of the guilty parties and burdened with all the evidences of the fraud, should escape the condemnation of the court? As we view this record the fraud of these parties taints the entire proceeding. There never was a moment, according to the record, when they really intended to invest a dollar in the enterprise. To be sure they devoted some time to the project, but their good faith was at no time apparent. The theory upon which the assessable stock has been ordered to be surrendered and cancelled is that it represents secret profits derived from the complainant. What does the promoters' stock now in the hands of Davis represent? It was acquired upon the theory that the members of the syndicate, having in good faith devoted their time and invested their money in inaugurating and prosecuting the enterprise, were entitled to special consideration by reason thereof. Instead of acting in good faith the defendants practiced deceit upon the complainant which, we think, is of such a nature and so closely related to the question now under consideration, as not to justify a court of equity in distinguishing between the two kinds of stock. Of course it was necessary for some one, if this property was to be acquired, to furnish the money. The defendants not only did not furnish any, but in addition to all the stock which they required there still remains in their hands over $1500 secret profits. Can it be that such a betrayal of trust should be rewarded by recognizing the validity of the promoters' stock thus acquired? Can it be that in a court of equity such gross breach of trust as these men have been guilty of is to be rewarded to such an extent? The assessable stock which has been ordered cancelled represented the fruits of a fraudulent conception, and yet but for the fraud practiced upon the complainant the defendants would not have received the promoters' stock. It is evident that they received that stock because it was then supposed that they were honestly acting in the interests of the complainant and assuming their share of the burdens arising. Had it been known that they were not acting in good faith, and that they were not investing a dollar in the enterprise, it is evident that they would have received no promoters' stock, for they had earned none. As the matter stands, therefore, the twenty-two shares of promoters' stock which the decree below has awarded the defendants represents remuneration for faithful and honest services freed from all taint of fraud. We are unable to concur in this result. In our view this stock is entitled to no greater consideration than the assessable stock. The character of the profit realized by the defendants can not purify its source. Their deceit should avail them nothing at the expense of the party defrauded.

The decree will therefore be reversed in part, with costs to the appellant in No. 2030, and the cause remanded with directions to enter a decree in conformity with this opinion.

Reversed in part.

WEDNESDAY, *June 1st, A. D.* 1910.

April Term, 1910.

No. 2030.

THE LAS OVAS COMPANY, INCORPORATED, Appellant,
vs.
NORMAN H. DAVIS and CHARLES T. PHILLIPS,

and

No. 2033.

NORMAN H. DAVIS and CHARLES T. PHILLIPS, Appellants,
vs.
THE LAS OVAS COMPANY, INCORPORATED.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, on appeal and cross appeal, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, reversed in part, with costs to the appellant in No. 2030, and that this cause be and the same is hereby remanded to the said Supreme Court with directions to enter a decree in conformity with the opinion of this Court.

Per Mr. JUSTICE ROBB,
June 1, 1910.

SATURDAY, *June 4th, A. D.* 1910.

No. 2030.

THE LAS OVAS COMPANY, INCORPORATED, Appellant,
vs.
NORMAN H. DAVIS and CHARLES T. PHILLIPS,

and

No. 2033.

NORMAN H. DAVIS and CHARLES T. PHILLIPS, Appellants,
vs.
THE LAS OVAS COMPANY, INCORPORATED.

On motion of Mr. J. K. M. Norton, of counsel for the appellees in No. 2030 and for the appellants in No. 2033, It is ordered by the Court that said appellees in No. 2030 and appellants in No. 2033,

be and they are hereby allowed an appeal to the Supreme Court of the United States, and the bond for costs is fixed at the sum of three hundred dollars and the bond to act as supersedeas is fixed at the sum of five thousand dollars.

(*Bond on Appeal.*)

Know all men by these presents, That we, Norman H. Davis and Charles T. Phillips, as principals, and The Empire State Surety Company, as surety, are held and firmly bound unto The Las Ovas Company Incorporated in the full and just sum of Five thousand ($5,000.00) dollars, to be paid to the said The Las Ovas Company Incorporated, its certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of June, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between the said Norman H. Davis and Charles T. Phillips, and The Las Ovas Company, Incorporated, a decree was rendered against the said Norman H. Davis and Charles T. Phillips and the said Norman H. Davis and Charles T. Phillips having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said The Las Ovas Company, Incorporated, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Norman H. Davis and Charles T. Phillips shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

NORMAN H. DAVIS AND
CHARLES T. PHILLIPS, [SEAL.]
By J. K. M. NORTON, [SEAL.]
Their Attorney.

THE EMPIRE STATE
SURETY COMPANY, [SEAL.]
By HENRY J. HUNT, 3RD, [SEAL.]
Att'y in Fact.

[Seal of The Empire State Surety Company.]

Sealed and delivered in presence of—
MONCURE BURKE,
As to signature of J. K. M. Norton.
FRANKLIN J. FREA.
LAWRENCE HUFTY.

Approved by—
CHARLES H. ROBB,
Associate Justice, Court of Appeals of the District of Columbia.

[Endorsed:] No. 2932. The Las Cruces Company, Incorporated, appellant, vs. Norman H. Davis and Charles T. Phillips, Supreme Court Writ on Appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed June 17, 1910. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, ss:

To The Las Cruces Company, Incorporated, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Norman H. Davis and Charles T. Phillips are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Chas. H. Robb, Associate Justice of the Court of Appeals of the District of Columbia, this 17th day of June, in the year of our Lord one thousand nine hundred and ten.

CHAS. H. ROBB,
Associate Justice of the Court of Appeals of the District of Columbia.

Service accepted this 17th day of June, A. D. 1910.
J. J. DARLINGTON,
Sol. for Las Cruces Company, Inc.

[Endorsed:] Court of Appeals, District of Columbia. Filed June 17, 1910. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to — inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The Las Cruces Company, Incorporated, appellant, vs. Norman H. Davis and Charles T. Phillips and Norman H. Davis and Charles T. Phillips, Appellants, vs. The Las Cruces Company, Incorporated, Nos. 2932 and 2933, April Term, 1910, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 17th day of June, A. D. 1910.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,230. District of Columbia Court of Appeals. Term No. 618. Norman H. Davis and Charles T. Phillips, appellants, vs. The Las Cruces Company, Incorporated. Filed June 24th, 1910. File No. 22,230.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 87.

NORMAN H. DAVIS AND CHARLES T. PHILLIPS, APPELLANTS,

vs.

THE LAS OVAS COMPANY, INCORPORATED, APPELLEE.

Statement.

In December, 1903, or January, 1904, appellants, Davis and Phillips, residing at the time in Havana, secured an option to purchase about four thousand acres of land in Cuba for ten thousand ($10,000) dollars. They met Benjamin Miess in Havana and told him about the property. Miess told them he thought he could interest some people in the property. Davis and Phillips came to Washington to try to sell the property, and Miess introduced them to George C. Held. They told Held of their option (P. R., 25). A number of meetings took place and the following paper was executed (P. R., 25, 26, 47, *et seq.*):

In

Duplicate.

"This memorandum of agreement by and between *the parties signing the same,* witnesseth:

"*Whereas, Charles T. Phillips* and *Norman H. Davis,* of Havana, Cuba, and *Hilary A. Herbert* and *Benjamin Micou,* of Washington, D. C., under the firm name of *Herbert & Micou, have secured an option* on a tract of land in Cuba containing 4,000 acres, more or less, the said land being the southern portion of the estate known as 'Las Ovas,' which estate contains 7,000 or 8,000 acres and is known as the property of the Widow Tarafa; the said 4,000-acre tract, the subject of this agreement, being situate in the Province of Pinar del Rio, south of the Western Railroad of Havana and extending to Lake Negrito;

"*Whereas,* if this 4,000-acre tract of land is suitable for the profitable raising of citrus fruits, oranges, lemons, grape fruit and the like, and a clear title can be obtained to the same, it is the desire of *all the parties* to this *agreement* that a corporation be formed under the laws of one of the States of the Union, to have its main offices at Washington, District of Columbia, for the purpose of acquiring this 4,000-acre tract of land and disposing of the same in ten-acre or other suitable-sized lots for groves of oranges, lemons, grape fruit, or the like; *it is agreed* as follows:

"That Messrs. *Phillips* and *Davis* and *Messrs. Herbert & Micou* will acquire this tract of land for a company to be organized for the purpose above mentioned, for the sum of twenty-five thousand ($25,000) dollars, $12,500 in cash on delivery of the deed of transfer, and $12,500 payable in twelve months, *and 40 per cent of the stock of the company* which is to be formed for the purpose of acquiring, developing and disposing of this property, said company to be organized upon general lines as follows:

"To have a capital stock of one hundred and fifty thousand ($150,000) dollars, 40 per cent of which, or $60,000 worth of stock to be given to Messrs. Phillips and Davis, and Herbert & Micou, *as compensation for securing the land and the preliminary work of getting up and incorporating the company afterwards to be organized;* the remainder of the $150,000 of stock, viz., 90,000 dollars, to be disposed of to the subscribers thereto for one-third of its face value, or $30,000.00; $25,000.00 of this money to go to the purchase

of the lands and $5,000 to be used as an expense fund as directed by the company, for the purpose of effecting sales of lots into which 4,000 acres shall be divided; this $90,000 worth of stock to be taken by the subscribers at one-third of its face value upon the following terms:

"One-half (½) payable down and the other half payable if necessary at the end of twelve months from the date of subscription.

"*It is further agreed* that in case it is desired by the persons subscribing to $60,000 of the $90,000 of stock, the remaining $30,000 will be taken by Messrs. Phillips and Davis and Herbert & Micou, to be divided between them as follows: $10,000.00 to Charles T. Phillips, $10,000 to Norman H. Davis, and *$10,000 to Herbert & Micou;* but as these last-named parties would own between them the $60,000 of the stock to be given for the purpose of promoting the company, and this $30,000 additional would give to them a controlling interest in the stock, they are only to take said $30,000 of the stock if it is desired that they do so by the other stockholders; or they are willing to take such portion thereof as the other stockholders may be willing that they should have.

"We the undersigned hereby bind ourselves, our heirs and assigns to take the number of shares of stock subscribed to by us to be paid for at one-third (⅓) of its face value, one-half (½) down and one-half (½) at the end of the year, if the second payment is necessary, upon the following conditions:

"That the hereinafter-named subscribers will select a person to go to Cuba without delay to examine the land and to investigate the title to the same, and in case a good title can be secured and the land is found to be suitable for profitable culture of citrus fruits—oranges, lemons, grape fruit, and the like—then this agreement to be in full force and effect, but otherwise to be null and void; and in case a good title cannot be secured, or the land is found to be unsuitable for the purpose for which it is intended, under the tenor of this agreement, then the persons who were to receive the $60,000 shares of the promoters' stock shall bear the necessary expenses of the trip to Cuba of the person selected by the subscribers hereto to make the investigation thereof."

	Number of shares subscribed. Nominal value, $1,000 each.
Chas. T. Phillips } Norman H. Davis }	60 shares.
As promoters' shares.	
Chas. T. Phillips	10 shares.
Norman H. Davis	10 shares.
Geo. C. Reid	30 shares.

This agreement was not to be binding unless approved after examining the property (P. R., 214).

The above instrument is incomplete as to the parties. The original was signed, or certainly agreed to, by one Billings for six shares and by "Herbert & Micou" (P. R., 40, 86, 167, 209).

Just after the above agreement, to wit, February 5, 1904, Davis, Phillips, and "Herbert & Micou" signed an agreement, drawn up by Micou (P. R., 87 and 226), by which Davis & Phillips were to receive two-thirds and Herbert & Micou one-third of all over $15,000 received for the property, whether money or stock. That agreement is as follows:

"The Jefferson, Richmond, Virginia,
"Richmond, —— —, 190–.

"Whereas there is now under consideration the organization of a corporation to acquire, develop and dispose of land in Cuba for orange growing and other purposes and the parties to this agreement who purpose being stockholders in said corporation have agreed or will agree with the other proposed stockholders of said corporation to acquire for and to deliver to the corporation when organized for $25,000 some 4,000 acres of land part of what is known as the Las Ovas tract in Pinar del Rio Province, Cuba, and whereas Charles T. Phillips and Norman H. Davis have an option on this land for $15,000, it is hereby agreed between Charles T. Phillips and Norman H. Davis as parties of the first part and H. A. Herbert and Benj. Micou, under the firm name of Herbert & Micou, as parties of the second part that any sum in excess of $15,000 paid for this land by the corporation or the subscribers to its capital stock shall be divided as follows—⅔ to be divided between the two parties of the first

part and ⅓ to go to the parties of the second part. Should the parties to this contract take stock in the corporation instead of money for the whole or any part of the excess over $15,000 to be paid by the corporation for this land then that such stock is likewise to be divided ⅔ between the parties of the first part and ⅓ to the parties of the second part. Agreed upon this 5th day of February, 1904.

"(Signed)

"NORMAN H. DAVIS,
"CHAS. T. PHILLIPS,
"HERBERT & MICOU,
"By BENJ. MICOU."

This agreement speaks of the option price as $15,000. Micou does not claim that he did not know that this was more than the price at which Davis & Phillips had their option. The $15,000 was the amount agreed by Davis, Phillips and Micou to be fixed as the price upon which the profits were to be figured and shared with Herbert & Micou.

Micou was selected by all the parties interested to go to Cuba and examine the property and have the title looked after. Reid also went, and after a thorough examination of the property by all the parties it was agreed to include additional property.

Davis secured an option to take this additional property on March 16, 1904 (P. R., 56).

Another agreement was thereupon entered into between the syndicate composed of Reid, Davis, Phillips, and "Herbert & Micou" on March 19, 1904, as follows (P. R., 90):

"This memorandum of agreement by and between the parties signing the same, witnesseth:

"That Charles T. Phillips and Norman H. Davis, of Havana, Cuba, and Colonel Geo. C. Reid, Hilary Herbert and Benjamin Micou, of Washington, D. C., under the firm name of Herbert & Micou, agree to purchase a tract of land in Cuba containing five thousand acres of land more or less, said portion being in the northern part of the estate known as 'Las Ovas' which estate is the property of the Widow Tarafa.

"The said five thousand acres subject to this agreement are situated in the Province of Pinar del Rio.

"That Messrs. *Reid, Phillips, Davis, Herbert & Micou, will acquire* this tract of land *for the formation* of a company to be organized for the sum of $34,000 which sum is to be paid, half in cash on delivery of the deed, and the other half paid in twelve months, and 40 per cent of the stock of the company to be formed.

"The company is to have a capital stock of $150,000, 40 per cent of which or $60,000 worth of stock to be divided equally between signers of this contract. Colonel Reid will have $15,000 of this stock; Messrs. Herbert & Micou will have $15,000 of this stock; Mr. Davis will have $15,000 of this stock and Charles T. Phillips will also have $15,000 of this stock. The remainder of the $150,000 worth of stock to be subscribed for by the people signing this agreement in proportion to the amount of shares subscribed *each one agreeing to pay sufficient money to pay for half of the land now, and the balance at the maturity of the mortgage,* provided, that there shall be an expense fund of $5,000.00 and each share shall pay its proportionate part as necessary and as is called for by a majority of the stock.

"Charles T. Phillips hereby subscribes for 22 shares stock.

"Colonel Reid subscribes for 35 shares of stock.

"Mr. Micou subscribes for 17 shares of stock.

"Mr. Davis for 10 shares of stock.

"Captain Billings has six shares of stock *which if not paid for, will be taken by the parties subscribing in proportion to their stock.*

"For the purpose of facilitating business and until the formation of the company, it is agreed by all parties that the property is to be placed under the name of Mr. Benjamin Micou who will deed it to the company as soon as same is formed, and Mr. Micou hereby acknowledges receipt of the checks of the different promoters for the stock that they have subscribed to.

"Havana, Cuba, March 19th, 1904.

"(Signed)

"CHAS. T. PHILLIPS,
"NORMAN H. DAVIS,
"GEO. C. REID,
"HERBERT & MICOU,
"By BENJ. MICOU.

"Endorsed on back: 2nd agreement."

It will be noticed from this final instrument that the parties signing it *"agree to purchase"* the property; that they *"will acquire this tract of land"* not for an existing company, but *"for the formation of a company to be organized."* The promoters' stock is divided equally between the signers, Reid taking one-fourth, though the first agreement provided for a division of one-third each to Davis, Phillips, and "Herbert & Micou."

Every share of stock in the proposed company is taken or provided to be taken by the members of the syndicate. There is to be an opening, *sub modo,* to let in Billings for six shares, but if he does not take them they are to be taken *"by the parties subscribing in proportion to their stock."* One of the syndicate is to take the title until the company is formed.

The parties to the agreement are to pay for the stock, pro rata, sufficient to pay for the property and provide an expense fund of $5,000.

Davis secured a valuable adjoining lake property for $1,000, which he turned in without profit either on it or the additional property embraced in the above agreement, making the total purchase price $35,000 (P. R., 28, 92, 93).

Billings did not come in and Davis subsequently took his six shares (Reid, P. R., 41) and sold the right to them, the company not being then chartered, to Dr. Z. T. Sowers, making a profit on his sale to Sowers.

The par value of the stock was $1,000 per share.

Application was made for a charter by all the syndicate and Dr. Sowers, and it was chartered early in June, 1904.

The property was conveyed to one Escalante, an employee of Davis and Phillips, and from Escalante to Micou.

Upon the organization of the company Micou conveyed to it.

The stock was all issued to the syndicate, except the Billings six shares, which were issued to Sowers, Davis having sold the right to them to him (P. R., 233).

Phillips sold ten shares of assessable stock to Parker and Ricks, and they not paying the assessment it went into the treasury of the company.

After the stock was issued there were various transfers. The stockholding at the time of bringing this suit was as follows (pp. 99, 235-37):

	Assessable.	Promoters.	Total.
Reid:			
(Including one share which he gave to his secretary, and one to his son to qualify them as directors.)			
Original subscription	35	15	
Bought from Phillips	6	8	
Bought from Herbert & Micou	9	3	
	50	26	76
Davis:			
Original subscription	10	15	
Bought from Phillips	6	7	
Bought from Herbert & Micou	8	3	
	24	25	49
Herbert:			
Original subscription	..	9	9
Sowers:			
Bought from Davis	6	..	6
In treasury of company:			
Bought by P. & R. from Phillips and failed to pay assessment	10	..	10
Grand total			150

The auditor of the trial court reported that all the stock that Davis bought from Herbert & Micou was assessable, but he is undoubtedly in error (P. R., 99, 100, 97). Davis positively testifies that three of these shares ($3,000) were promoters' (p. 100), and Reid, though called in rebuttal to contradict Davis in other matters, does not dispute as to this, though Reid had the stock books and transfers, and on page 97 of the printed record will be found Reid's receipt to Davis, showing that his assessable stock was only 24 shares, so that his other 25 shares (including this three) were promoters'.

Reid testified that Davis and Phillips told him that the

price named in the syndicate agreement was what was to be paid the owner for the property. Davis and Phillips both denied this (pp. 94, 170), but admitted they did not communicate that they were to get the property at a less price, and Davis admitted that the taking of the deed first in the name of Escalante was partially to keep Reid from knowing.

The partnership of Herbert and Micou, through Micou, were parties to every agreement. The signature is "Herbert and Micou, by Benj. Micou." Hilary A. Herbert, the other partner, actually had $9,000 of the promoters' stock at the institution of this suit. His partner, Micou, through the agreement in the firm's name, also received some of the cash difference between what was paid the owner for the property and what was paid by the syndicate on their stock.

Reid, as secretary and treasurer, was sent by appellee to Havana in March, 1905, to see about the deeds to the property, and about March 25, 1905, learned that the owner of the property received $20,000 for it (P. R., 31).

On May 22, 1905, a special or called meeting of the directors was held, and authorized the employment of an attorney to bring suit if necessary against Davis and Phillips. The meeting was composed of Reid (holding a majority of the stock), his son, his clerk, and Sowers (P. R., 34).

On June 28, 1905, another special meeting of directors was held and proceedings were authorized. There were present Herbert, Reid, his clerk, and Sowers. No notice was sent Davis of either meeting, though he had been notified of other meetings (P. R., 34, 202, 203).

Reid, who controlled the company and was its secretary and treasurer, after knowing all about the price paid for the land to the owner, still treated Davis' stock as valid and wrote Davis about the assessments on it. Spoke of taking up the question of getting additional land for the company with Davis and of joining with Davis in buying some of the stock that Phillips had sold to Parker and Ricks. Wrote

Davis that he was glad he was coming to Washington. The letters were very friendly indeed (P. R., 150, 151).

Davis came to Washington and was met by process in the suit Reid had ready for him.

Neither Herbert nor Micou were made parties, and Herbert took part in the special meeting that authorized suit against Davis and Phillips, holding at the time $9,000 of the promoters' stock that he got by the agreement between Davis, Phillips, and Herbert & Micou, through Micou.

Both Herbert and Micou, through the partner Micou, were parties to every agreement.

The property was valuable (P. R., 216).

The object of the suit is to cancel all the stock of Davis and Phillips.

The result of the suit if maintained will be to make Davis bear practically the whole burden, as Phillips has sold his stock.

The bill is so drawn as to make it appear that there were other stockholders than the syndicate, and omits the fact that "Herbert & Micou," partners, through Micou, shared in the secret profits (P. R., 87, 98, 99, 112, 131, and 133).

The evidence shows that there were no stockholders except the syndicate, and that no other stockholders were contemplated than the members of the syndicate—one member dropped out and Davis sold the right to these shares to Sowers. Sowers simply took the place of Billings in the syndicate.

Reid, "Herbert & Micou," and Sowers, who took the place of Billings, were just as much promoters as Davis and Phillips.

The suit is simply an effort of a part of the promoters to use the company to sue other promoters (Davis and Phillips) for an alleged deception upon other members of the syndicate, or promoters, in the hopes of getting a different and greater relief than could have been gotten in suits as individuals, to wit, the cancellation of stock.

The Court of Appeals of the District of Columbia in its opinion held that the entire stock held by Davis should be canceled—his twenty-four (24) shares of assessable stock because undisclosed profits went into them; his twenty-five (25) shares of promoters' stock, which was openly agreed upon, as a punishment and penalty for taking other profits not agreed upon, and in addition that appellants, Davis and Phillips, should pay the sum of $1,546.54, with interest from November 25, 1908, and said court so adjudged in its decree of June 1, 1910.

From said decree and opinion this appeal is taken.

Errors Assigned.

The court erred:

I. In not dismissing the bill of complaint, when the evidence showed that the plaintiff was not entitled to the relief prayed for, had no right to bring the suit, and that the suit was not legally authorized.

II. In not dismissing the bill for the failure to make Hilary A. Herbert and Benjamin Micou defendants.

III. In decreeing the cancellation of any of the stock held by Davis.

IV. In decreeing the cancellation of the twenty-five (25) shares of promoters' stock, part of the $60,000 held by Davis, about which there was no secret.

V. In decreeing the cancellation of twenty-seven (27) shares of stock as assessable stock, when Davis had only twenty-four (24) shares of assessable stock.

VI. In decreeing the cancellation of eleven (11) shares of stock that Davis purchased from Micou or "Herbert & Micou."

VII. In decreeing that appellants, Davis and Phillips, should pay in money $1,546.54.

ARGUMENT.

I and II.

The Bill Should Have Been Dismissed

Because:

1. *The appellee (hereafter called company) proved no right to the relief prayed for.*

The company was merely a receptacle for the property, a creature erected for the convenience of the syndicate. The syndicate instead of taking the property in their own name put it in a company, which company was themselves, and only themselves, and gave it back to themselves in the shape of a certain number of shares of stock.

Appellants, Davis and Phillips (hereafter called by name), had an option on property; they mentioned the matter to Benjamin Micou; he became interested in the venture, and with a view to disposing of the right introduced Davis and Phillips to Geo. C. Reid and Billings. It was agreed by the syndicate to take the property, if approved of after examining it, and eventually to put it in a company when formed. That company, however, was to be entirely composed of the syndicate. Every share of stock was taken in advance by the syndicate.

The final agreement, after the property was examined (P. R., 90), provided that Phillips, Davis, Reid, Herbert & Micou *"agree to purchase a tract of land in Cuba;"* that they would "acquire this tract of land *for the formation* of a company." Forty per centum of the stock was to go one-fourth to Herbert & Micou, one-fourth to Davis, one-fourth to Phillips, and one-fourth to Reid. The last named had demanded and been allowed an equal share before making the final agreement. Reid gives the following reason for

sharing in the promoters' stock, though he was a party to the first agreement (P. R., 48-49), in which he was not to share.

"After I had been to Los Ores to see the property I said to Davis, Phillips, and Mieou that I thought I should share in the non-assessable stock, as well as Herbert & Mieou, inasmuch as I had to pay so much more toward its purchase; *that I was willing that Phillips and Davis should have promoters' stock; they had been the ones who originated the proposition and brought it to our attention*" (P. R., 208). As to the remainder of the stock the agreement provides, "The remainder of the $150,000 worth of stock *to be subscribed by the people signing this agreement.*"

Phillips, Reid, Mieou (for Herbert & Mieou), and Davis subscribed for all the stock except six shares. These six shares were set aside for Billings, who was a party to the first agreement, if he wished to continue. As to this six shares, it was provided that if Billings did not take them they would be taken by "*the parties subscribing in proportion to their stock.*"

Billings did not come in and Davis took his six shares (P. R., 41), without objection on the part of the others, and sold the right to them to Sowers. It was immaterial to the company what the property cost. If it can be distinguished from the syndicate it simply gave them all its stock for the property. It made no difference to the company as a separate entity from the syndicate whether the property cost one dollar or one million, for the syndicate agreed for their shares "to pay sufficient money to pay for half of the land now and the balance at the maturity of the mortgage, provided there shall be an expense fund of $5,000, and each share shall pay its proportionate part as necessary and as is called for by a majority of the stock."

The syndicate instead of taking the property in their own names simply put it in the company and took it back in the form of all of the stock of the company. The whole thing was a mere form or paper transaction and in no way changed the real ownership.

In the first agreement the same amount of stock, viz., $150,000, less 40 per cent promoters' stock, was to be given for the property, at a valuation of $25,000, to the subscribers, who were to pay therefor the cost of the property, and an expense fund of $5,000, as was to be given in the final agreement for a larger property, at a valuation of $34,000. And when it was concluded to embrace still additional property, after the said final agreement, the company gave no more for it.

The only interested parties were the syndicate. They had to contribute enough to pay for the property and provide an expense fund.

Now, Reid claims that Davis and Phillips deceived him as to what was to be paid for the property. They deny this most emphatically; and it seems rather strange that they would have made false statements in the presence of Micou (P. R., 35), against whom no charge is made and no suit is brought, though his father-in-law and partner, Herbert, was president of the company and participated in the directors' meeting that directed suit against Davis and Phillips, and at the time had $9,000 promoters' stock, which he got through the dealings of his partner with Davis and Phillips. Micou knew that less was to be paid the owner for the property than the price at which the syndicate was to buy (P. R., 87). Reid, after he knew what the property cost, could hardly have thought, then, that Davis had made false statements to him, for he wrote him affectionate letters and was considering entering into other transactions with him (P. R., 150-151). Were his letters sham and hypocrisy? Then, can his word be taken as a preponderance against both Davis and Phillips?

As to Sowers, Davis simply sold him the right to take the Billings six shares. That was certainly a matter entirely between Davis and himself. Micou was present here also (P. R., 23). The company had nothing to do with the transaction and had no interest in it. At best for Sowers, as

counsel for appellee said in his brief below, "*Sowers became Billings, for every legal or practical intent or purpose, and stands in all respects in his stead.*"

The question is then presented, if we admit, for the purposes of this point, that Davis and Phillips did deceive some of the syndicate, What has the company to do with that?

Can the company in such a case as this, where the syndicate put the property in its name and took it back in the form of all its stock, bring suit for a deception upon some members by other members of the syndicate when the public was not only not brought in, but could not be brought in, as the company had no stock to sell the public?

Certainly no reason can be given why either Reid or Sowers can use the company to sue for any injury they may claim that Davis and Phillips did them.

The authorities, both text writers and cases, are to the contrary.

This court in the recent case of Old Dominion Copper Mining & Smelting Co., &c., *vs.* Lewisohn, 210 U. S., 206, has decided that suit in such a case cannot be maintained by the company.

In that case the bill expressly alleged that Bigelow and Lewisohn took $750,000, secret profits, without the knowledge of the syndicate.

Here it is alleged that Davis and Phillips received $15,000, secret profits, unknown to the syndicate. (The evidence also shows that "Herbert & Micou," partners, through Micou, received a part of the secret profits.) (P. R., 87.)

As to this, this court said in the Lewisohn case:

> "Whether or not there was a subordinate fraud committed by Bigelow and Lewisohn, on the agreement with them, as the petitioner believes, is immaterial to the corporation. * * * Bigelow and Lewisohn, it is true, divided the stock received for the real estate now in question. *But that was a matter between them and the syndicate.*"

In the Lewisohn case, just as in the case at bar, it was alleged that some member of the syndicate took advantage of other members and took profits from the company unknown to all the syndicate. In that case, just as in ours, all the syndicate were to share in the company's stock, the only difference being that in our case the syndicate were to take all the stock, while in the Lewisohn case $500,000 of stock was from the inception of the plan to be issued to the public after the company was formed.

The court held that even this issuing of stock to the public did not of itself give the company any right to sue, saying:

> "If there was a wrong, it was when the innocent public subscribed. * * * For it is only by virtue of the innocent subscribers' position and the promoters' invitation that the corporation has any pretense for a standing in court."

The decision in the above case is sustained by the authorities.

Morawitz on Corporations (2d Ed.), sec. 202.

When directors issue the whole stock of the company for property worth less than the par amount no one is injured in the least.

Cook, Corporations (6th Ed.), sec. 651.

Blum vs. Whitney, 185 N. Y., 232 (1906):

When all the stock of the company is turned into another company in exchange for the stock of the latter, and the promoters are the only ones interested, though the stock is afterwards sold, the promoters cannot be held. The court said:

> "They dealt wholly with themselves, as sellers and buyers, organizers and corporation. *If fraud had been practiced by any one of the organizers upon*

those associated with him, the cause of action would have vested in the party injured."
Cook, Corporations, sec. 651, p. 1888.

Stratton, &c., *vs.* Pines, 126 Fed., 968 (1904); aff'd 135 Fed., 449:

When all the stock of a corporation is issued in payment for property the vendor cannot be held liable for misrepresentations as to the value of the property.

See also:

Foster *vs.* Seymour, 23 Fed., 65.
McCracken *vs.* Robinson, 57 Fed., 375.
Du Pont *vs.* Tilden, 42 Fed., 87.
Wood *vs.* Corry Water Works, 44 Fed., 146.
Fort Madison Bank *vs.* Alden, 129 U. S., 373.
Barr *et al. vs.* N. Y., L. E. & W. R. Ry. Co., 125 N. Y., 263, 273.
Seymore *vs.* Spring Forrest Asso., 144 N. Y., 333.
Thornton *vs.* Wabash Ry. Co., 81 N. Y., 462, 467.
Parsons *vs.* Hayes, 14 Abb. N. C. (N. Y.), 419, 434.
King *vs.* Barnes, 109 N. Y., 267, 268.
Insurance Press *vs.* Montauk Wire Co., 103 App. Div. (N. Y.), 472.
Higgins *vs.* Lansing, 154 Ill., 301, 331, 336.
Spaulding *vs.* North Milwaukee Town Site Co., 106 Wis., 481, 488, 489.
Garretson *vs.* Pacific Crude Oil Co., 146 Cal., 184.
St. L., F. S. & W. Ry. Co. *vs.* Tierman, 37 Kan., 666, 683.
Walburne *vs.* Chouault, 43 Kan., 356, 361.
Arkansas, &c., Co. *vs.* Farmers, &c., Co., 13 Colo., 587.
Tompkins *vs.* Sperry Jones, 96 Md., 560, 583.
Swift *vs.* Smith, 65 Md., 428, 435.
Merchants & M. S. B. *vs.* Burlington C. & I. Co., 41 S. Eastern R. (W. Va.), 390.

Clark *vs.* American Coal Co., 17 L. R. A., 557, 561 (Iowa).

Divine *vs.* U. S. M. M. & Co., 38 S. West. R., 93, 98 (Tenn.).

In re Ambrose L. R., 14 Ch. D., 390, 395, 396, 397, 399 (English).

Salomen *vs.* Salomen, L. R. (1897) A. C., 22 (Eng.).

In Foster *vs.* Seymour, *supra*, Wallace, J., says (p. 66):

> "There was no fraud upon the corporation. At the time the scrip was exchanged for the mining property, the trustees were all there was of the corporation. There were no stockholders, unless they were stockholders. What was done was done by the corporation. By the exchange the corporation got the mining property, and gave it back to those from whom it got it, divided into 100,000 shares of the nominal value of $100 each."

In McCracken *vs.* Robinson, *supra*, the Circuit Court of Appeals, in describing a similar situation, says (p. 377): "While directors in name they were principals in fact," and later on the opinion condemns the building up of a theory "by confounding names with things and forms with substance."

In re Ambrose, *supra*, James, L. J., says (p. 395):

> "In my view the company only gave back in substance that which it was getting, and *the fraud* was *not between the vendors and the Company*, the purchaser, but was a thing calculated to delude people into believing that the shares when got were something more valuable than they really were.
>
> *"What was taken back was the very thing that was given in exchange for it, calling it by different names and dividing it into different shares."*

Colton, L. J., on page 399, says:

> *"The remedy is a remedy of each purchaser of shares, if there were any such, who was deceived by the representations made by his vendor."*

There is no legal difference between the holder of an option and a full owner of land.

Densmore Oil Co. *vs.* Densmore, 64 Pa., 49.
Cummings *vs.* Beavers, 103 Va., 230.

It was claimed on behalf of the company that the question of dismissing the bill was not properly raised. Exactly what was meant is not perceived. If a plaintiff has not proved a case entitling it to the relief prayed for it is not entitled to any decree and the bill must be dismissed. Any decree entered in such a case is erroneous. Such questions can be presented at any time and anywhere in the trial court and in the appellate court.

2. *Neither Reid, who absolutely controls the company and its directors, nor Sowers can use the company to sue for an alleged wrong done to them by Davis and Phillips.*

The syndicate agreement affords no basis of claim on the part of the company.

The syndicate agreement was wholly between the parties thereto.

Hutchinson *vs.* Simpson, 92 App. Div., N. Y., 382.
Blum *vs.* Whitney, 185 N. Y., 232, 241, and cases above.

The formation of the company, the taking of all its stock, and the putting of the title to the property in it were all merely the carrying out of the syndicate agreement.

Equity looks at the substance and not at the form of things. There is nothing here for the company to sue for.

Thompson on Corporations, 3d Ed., sec. 3997:

The board of directors cannot fritter away its funds in litigation in respect of their own individual rights in the corporation.

As the trial judge said in his opinion (P. R., 230):

> "At the time the final agreement and subscription was made, March 19, 1904, the understanding was that Phillips, Davis, Reid, and Herbert & Micou (partners) were to turn over the land to the company for $34,000 (subsequently increased to $35,000) and forty per cent of the stock of the corporation, *i. e.*, $60,000, which stock was to be divided between them in four equal parts. In this respect, all these parties were 'promoters,' and the stock taken by each was 'promoters'' stock, and a profit to each for launching the enterprise." (See Contract, P. R., 90, 91.)

3. *The company has not authorized this suit.*

The suit was authorized at a special meeting of the board of directors, of which Davis, who was a director, was given no notice. He was notified of all other meetings except the two special meetings held with reference to bringing suit against him (P. R., 34, 202, 203, 204).

The law is well settled that no action of a special meeting of the board of directors is valid unless all the directors are notified, even though the presence of the absent ones could not have changed the result.

Mr. Thompson, in his work on the Law of Corporations, recognized as one of the best authorities on the subject, volume 3, section 3936, says:

> "When the meeting is a stated one the time and place of which is fixed by some by-law or regulation, no notice of it is necessary, but when it is a special or called meeting, all the members must be notified of it. * * * The right of all the directors to notice is founded on the right of being present for the pur-

poses of consultation, of which right a minority cannot be arbitrarily deprived by a majority. It follows that proceedings at a special meeting held by a bare majority of the members of a board of directors of a corporation, without notice to the other members, *are void*, although all those present voted in favor of the action taken, and the result would have been the same had the other members been present."

It is true that Davis had given Reid a power of attorney to represent him at meetings of directors, but this did not avoid the necessity of notice for several reasons:

a. Such power of attorney is a nullity.

Thompson on Corporations, volume 3, section 3909:

> "A power of attorney from one director to another to represent him at meetings of the board is illegal and void."
>
> *Idem*, volume 3, section 3925.

b. The power of attorney from Davis to Reid, even if valid, could not be used by Reid in such a matter as a suit against Davis. Such use could not have been intended by Davis, and would be a fraudulent use of the same.

c. The power of attorney had never been considered or acted on as rendering it unnecessary to send notice to Davis of meetings, but only to represent him if absent. Notice had been sent him of every meeting prior to these.

The Court of Appeals took the ground that the power of attorney was a waiver on Davis' part and that he was estopped.

Upon what ground is Davis estopped? Can it be conceived that Davis ever dreamed that the power of attorney could or would be used to bring suit against him?

The law is that any special meeting held without notice to a member is a nullity.

Not only this, but it was never, before these meetings, considered that Davis should not be notified. Notice was always, before this, sent him. The power of attorney was only to represent Davis if not present. He was entitled to notice, so that he could be present, if he desired. The power simply authorized Reid to represent him at meetings if absent. It in no way waived his right to notice, which he continued to receive until these meetings.

Again, to fail to notify Davis and order suit against him and leave out his partner in the enterprise, Herbert, who took part in the meeting, though he was equally liable with Davis and Phillips, through his partner, Micou, because Herbert was Reid's intimate friend, was not only inequitable and unjust, but was a fraud on Davis.

Reid, who controlled the company and its directory at the time of the meeting, was writing Davis most affectionate letters (P. R., 150, 151), and yet he had authorized suit against Davis and kept his friends Herbert & Micou out of it.

As Mr. Thompson says, each director is entitled to be present and have a chance of discussion.

His proxy to represent him is only in case he is not present. It cannot be treated as a waiver of notice. His right to notice and to be present is one thing. His proxy to represent him if not present is another and different thing.

It was contended that the president had a right by virtue of his office to bring this suit.

In the first place the president, Herbert, was legally just as liable to suit as Davis and Phillips for his firm, through his partner, Micou, shared to some extent at least in all profits, and Herbert had $9,000 of promoters' stock when suit was brought, and surely a court of equity would not allow him to sue others and not himself.

In the second place, it appears that the suit was brought by authority of the board of directors in a called meeting, of which Davis had no notice.

In the third place, Reid gave all the information upon

which suit was brought and swore to the bill, not the president, Herbert (P. R., pp. 35, 36). It nowhere appears that Herbert brought or directed the suit as president.

Finally, a president of a bank or similar corporation may bring suit about ordinary corporate business, and the authorities relied on by appellee are of this character, but it is not believed that any authorities can be found which authorized the president to bring suits of this sort on his own motion. If such were the law any president could ruin the corporation by involving in it ruinous litigation.

4. *Herbert and Micou should have been made parties.*

The fourth ground urged for the dismissal of the suit is the failure, and, though the evidence and proceedings showed the propriety and necessity, the refusal of the plaintiff to make Hilary A. Herbert and Benjamin Micou, composing the firm of Herbert & Micou, parties defendant.

There is no question, no dispute that Herbert and Micou participated with Davis and Phillips in all profits, secret and otherwise (Agreement, P. R., 87).

If there is any liability it is due from Herbert and Micou, as well as from Davis and Phillips. Herbert and Micou disposed of their stock except $9,000 of promoters' stock still held by Herbert, some being bought by Davis and some by Reid. Even the stock bought from Herbert and Micou is directed to be cancelled and redounds to the benefit of the $9,000 held by Herbert, though the plaintiff treats Herbert and Micou as free from blame. Concisely stated, Davis, Phillips, and "Herbert and Micou" receive certain profits in stock and money. The stock of the company is in part assessable, in part not assessable. Davis buys some of Herbert and Micou's stock of both kinds. Reid does the same. Davis and Reid also buy all of Phillips' stock. The cash profit, which was the only secret profit received, was divided between Davis, Phillips, "Herbert and Micou." "Herbert

and Micou" reside within the jurisdiction of the court. Herbert still holds $9,000 of the promoters' stock.

Davis is required to surrender for cancellation $49,000 of stock, part of which he bought of Herbert and Micou, and to pay $1,546.54 in cash. Result: Phillips escapes practically free; Herbert escapes free; Micou escapes free; Davis alone is held. He is required to surrender all the stock he originally held and also all he bought from Phillips and "Herbert and Micou," his partners in the whole transaction. And Herbert, who still holds his profit of $9,000 of stock, actually shares in what is taken from Davis.

Does not the mere statement of the facts show the absolute necessity of making Herbert and Micou parties? Can such inequitable and one-sided result have the approval of a court of equity?

General Reid was a marine officer. Colonel Herbert was once Secretary of the Navy. He and Reid are warm friends. Reid, controlling the company and its directory, seeks to let his friend escape. Will equity aid him and, in doing so, commit a great injustice? Upon what ground can a court of equity allow some of the parties to escape and throw the whole burden on one?

The trial judge, with whom on this point the Court of Appeals agrees, says (P. R., 228):

> "*Undoubtedly* Herbert and Micou would have been proper parties defendant, and, under the equity practice as it existed in England, prior to the adoption of the 32d order of August, 1841, would have been necessary parties. This order, however, which is substantially rule 51, of the Rules of Practice, adopted by the Supreme Court for the courts of equity of the United States, renders it possible for a plaintiff who has a joint and several demand against several persons, to proceed against one or more of the persons severally liable."

It is not perceived what bearing rule 51 has on this case. The rule, clearly, relates only to contract demands. It can-

not be tortured into meaning that if several parties have taken and shared in undisclosed profits some of them can be sued and others left out, when all are within the jurisdiction of the court, and the result would be to put the entire burden on one and actually allow one promoter to share in what was taken from another.

Certainly, in a case of this sort, if only a part are sued each one can only be held for the profits received by him.

As the plaintiff refused to make Herbert and Micou parties and make the action joint against all, it is extremely unjust and inequitable to require Davis separately to surrender $49,000 of stock and to pay money in addition. Why should Davis suffer this heavy penalty alone, for the stock is valuable (P. R., pp. 216 and 221), and Phillips escape for a small cash sum and Herbert and Micou escape free?

If the suit can be maintained equity and justice can be done only by making them all parties.

The above principles are fully sustained by the authorities. Thompson on Corporations, section 473:

> "In equity, the object is to do complete justice to all, therefore *all who concurred in a misapplication of funds in promoting, ought to be charged with the loss and not throw the whole burden on a part.* For otherwise, as was said by V. Chancellor Park, the others who participated in the fraud, would have the benefit of its being brought back."

This is exactly the injustice done in this case. The $49,000 of stock held by Davis ordered surrendered and the money ordered to be paid by him adds greatly to the value of the stock held by Herbert.

This court has recently said that this cannot be done.

In Old Dominion Copper Mining Company, etc., *vs.* Lewisohn, *supra*, the court, in affirming the dismissal of the bill, said:

> *"Here the members of the syndicate, although members of the corporation, are not joined and it is sought to throw the burden of their act upon a single one."*

In Shields *vs.* Barrow, 17 Howard (U. S.), 130, the general rule as to necessary parties is

> "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest *or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.*"
>
> Approved in Barney *vs.* Baltimore, 6 Wall. (U. S.), 280.

In Jessup *vs.* Illinois Cent. R. Co., 36 Fed., 738, the rule is thus stated:

> "If the defendants actually before the court may be subjected *to a liability under the decree, more extensive or more direct than if the absent parties were before the court, that of itself will in many* cases furnish a sufficient ground to enforce the rule of making the absent persons parties."

The court gives as one of the reasons why "Herbert & Micou" were not necessary parties, that "Micou, on the institution of this suit had parted with his stock, and *since the decree appealed from does not charge the defendants with liability for the secret profits of Micou, they are in no way prejudiced by the failure to include him as a party*" (P. R., 249). This is exactly what the decree did do. It forfeited the eleven ($11,000) shares of stock Davis got from Micou.

As to not making Herbert a party, the court further says that Herbert did not know of his partner's participation in such profits (P. R., 249). Before taking any testimony Herbert knew (P. R., 221) his partner knew all the time, and, legally, this is the same as if Herbert knew (Agreement, P. R., 87).

It was claimed for appellee in the Court of Appeals that the question of Herbert and Micou being necessary parties was not properly raised. The trial court considered the question properly raised and passed upon it (P. R. 228).

Before any testimony was taken, Herbert, the president of the company, was informed by Phillips in a letter (P. R., 222) that there was a "written agreement signed by Phillips, Davis, Herbert & Micou, Mr. Micou signing for your firm * * * that whatever possible wrong could be charged to Phillips and Davis would also be made against Herbert & Micou." The letter informed Mr. Herbert where he could see this written agreement. The evidence at an early stage showed that they should be made parties to accomplish equity and prevent injustice.

III.

It Was Error to Decree Cancellation of Stock.

If, by giving a different name to the same thing, by some strange legal fiction the company may be allowed to sue about matters wholly between the syndicate promoters, what is the proper recovery?

Not cancellation of the stock. The company had agreed to give the same amount of stock, under the first agreement, for 4,000 acres, at the price of $25,000, as it did under the second agreement for additional land at the price of $34,000, and when still more land was added at a price of $1,000 it gave nothing more.

Neither Davis nor Phillips nor "Herbert & Micou" got any stock from the company with secret profits. All its stock was going for the property, no matter what the price. Nor did they get any stock from the company by money paid by it for the property.

If the company can sue it can only be for the money received as secret profits. This money did not come from the company or the public as subscribers for its stock. It came

from the syndicate promoters, who paid for their stock sufficient to pay for the property. The situation is not altered by the syndicate paying the last payment into the company and then paying it out in the name of the company.

As the company has only sued Davis and Phillips, though "Herbert & Micou" were within the jurisdiction of the court, it is not equitable to make Davis and Phillips pay more than their part.

It may be true that, in exceptional cases one or more may be sued, in a case like this, for the secret profits received by a combination of several; but there must be some reason for leaving out the others.

Equity will surely not allow the plaintiff to purposely leave out some and make victims of a part without good reason.

The supreme purpose of a court of equity is to do equity. Not in some cases, but in all cases.

Thompson on Corporations, section 473:

> "In equity, the object is to do complete justice *to all, therefore all who concurred in a misapplication of funds in promoting ought to be charged with the loss, and not throw the whole burden on a part.* For otherwise, as was said by V. Chancellor Park, the others who participated in the fraud, would have the benefit of its being brought back."

Old Dominion Copper Mining Co. *vs.* Lewisohn (*supra*):

> *"Here the members of the syndicate, although members of corporation, are not joined and it is sought to throw the burden of their act upon a single one."*

Shields *vs.* Barrow, 17 Howard (U. S.), 130.
Barney *vs.* Baltimore, 6 Wal. (U. S.), 280.
Jessup *vs.* Illinois Cent. R. Co., 36 Fed., 738.

Thompson on Corporations, section 465:

"The measure of the recovery in equity is only the net secret profits."

McIlhenny's Appeal, 61 Pa. St., 188:

In the case of a promoter "it is not damages in a case like this that equity gives, it is restoration of the thing wrongly taken, namely, the money received."

In the well-considered case of Emma Silver Mining Co. *vs.* Grant, 11 Law Reports Ch. Div., 918, it was held that in estimating secret profits allowance must be made for all expenses incurred.

"Herbert & Micou," through Micou, received some of the secret profits (Agreement, P. R., 87; also pp. 97, 100, 112).

So far as the company is concerned, not having made "Herbert & Micou" partners, it must be presumed they received their full part.

The company must be consistent. It cannot leave out "Herbert and Micou," thus treating them as innocent, and at the same time hold Davis and Phillips for all the secret profits, some of which was certainly received by "Herbert & Micou," through Micou.

Am. & Eng. Enc. of Law, vol. 7, p. 22.

Littel *vs.* Julius Lansburgh Furniture Co., 96 Va., 540.

It is merely mixing and twisting things to say secret profits received from the company bought any stock held by Davis. All the stock was to be paid for the property, whether it cost much or little. So that enough money for the property and $5,000 expense fund was furnished, it mattered nothing to the company who put it up. Its position was simply: Here's all my stock for the property and expense fund. Whether some members of the syndicate put up more than their part was nothing to the company.

Whether stock shall be cancelled or the secret profits in

money refunded must depend in each case upon the facts disclosed.

This case is not like Yeiser *vs.* U. S. Board and Paper Co., 107 Fed. R., 340, so much relied on.

In that case the promoters organized a company and sold property to it. The public was then invited to and did subscribe and pay for stock. The promoters subscribed for some of the stock and paid for it with the purchase money illegally gotten from the company.

In our case the public neither subscribed for any stock nor were asked to do so. The promoters got no money from the company or the public.

It is submitted that to cancel stock held by Davis would be inequitable, and that the remedy, if any exists, is to compel restoration of the money received by Davis and Phillips less all expense.

IV.

It was error to decree the cancellation of the $25,000 promoters' stock held by Davis, about which there was no secret.

There was no secret about the $60,000 of promoters' stock. Both the first and final written agreements provided that the syndicate promoters should receive it (P. R., 46, 47, 48, 49, 90). Under the first agreement it was to be divided between Davis, Phillips, and "Herbert & Micou" as compensation *"for securing the land and the preliminary work of getting up and incorporating the company."* Under the final agreement Reid was to share, and the consideration was that Davis, Phillips, Reid, and "Herbert & Micou" *"will acquire this tract of land for the formation of a company to be organized."*

There is no question that what was to be done for the stock was done.

The company, if it had any right to sue, might possibly ask for a rescission of the contract, offer to return the property, and recover its stock, putting all the parties in *statu*

quo. But, surely, it cannot keep the property and recover what was openly agreed to be paid for it.

The authorities relied on, Barney *vs.* Sanders, 16 How., 535, and Walker *vs.* Beal, 9 Wall., 743, were cases of ordinary trustees, whose compensation was a matter of grace, not of right; where the allowance of compensation and the amount or the disallowance depended entirely upon the services performed and the faithfulness or unfaithfulness of the trustees' actions.

In the case at bar the compensation was a matter of contract, and the thing to be done having been done the company cannot both keep the property and recover what was agreed to be paid.

The company recognizes the $26,000 of this promoters' stock held by Reid, being his original 15 shares, and eight he got from Phillips and three from "Herbert & Micou," and the $9,000 held by Herbert, and yet seeks to cancel $25,000 of this same promoters' stock held by Davis, being his original 15 shares, and seven he got from Phillips and three from "Herbert & Micou."

This would be a great thing for Reid and Herbert, to keep their $35,000 of this stock and, through the fiction using of the company's name, to cancel their fellow-promoter Davis' $25,000.

The theory the court proceeded on in cancelling this stock is that equity can inflict pains and penalties and mete out punishment and take away from one party to a contract what was agreed to be paid him and let the other party keep property and not pay for it.

Thompson on Corporations, section 8287:

> "As in the case of directors, the thing which the rule condemns is the taking of *secret* profits by the promoter from the corporation which he promotes. It does not inhibit the taking of *open* profits."

Idem, sections 459, 463:

While a promoter may be charged with secret profits he is entitled to his expenses.

In the case of McIlhenny's Appeal, 61 Pa. St., 188, which was a case in which a promoter was charged with secret profits, the court uses this language:

> "It is not damages in a case like this that equity gives, it is restoration of the thing wrongfully taken, namely, the money received, or an equal sum and interest."

In the well-known case of Emma Silver Mining Co. *vs.* Grant, 11 Law Reports, Ch. Div., 918, where Grant was held liable for the amount of secret profits he had made, it was also held that in estimating the amount of such profit he was entitled to be allowed all sums expended in the promotion.

All the cases we have been able to find negative the idea that a court of equity can penalize and fine in such cases by taking away what was openly agreed to be given.

V.

It was error to decree the cancellation of twenty-seven (27) shares as assessable stock when Davis had only twenty-five (25) shares of assessable stock.

There is not the least question that three ($3,000) of these twenty-seven shares were part of the sixty thousand dollars promoters' or non-assessable stock. These three shares Davis purchased from Micou. Davis testified positively to this (P. R., 100). Reid, the secretary and treasurer of the company and the real prosecutor of this suit, was called in rebuttal of Davis, and contradicted Davis in several particulars, but did not contradict him as to this. Reid had the books and knew that Davis was correct as to these three shares. After Davis had all the stock bought by him trans-

ferred by Reid on the books of the company he received from Reid a receipt for his assessment on all of his assessable stock, viz., 24 shares (P. R., 97). This shows conclusively that Davis had only 24 shares of assessable stock.

VI.

It was error to decree the cancellation of eleven shares ($11,000) of stock that Davis purchased from Micou, or "Herbert & Micou," Micou paid something on this stock, certainly at least $1,200.00 (P. R., 181). He borrowed it from Reid, but this made no difference to the company.

There is no question that Davis, Phillips, and "Herbert & Micou" were parties under a written agreement, and that "Herbert & Micou," through Micou, shared in the secret profits (Agreement, P. R., 87; also pp. 97, 100, 112). The company did not make "Herbert & Micou" parties defendant, as it should have done, and did not call on them for any responsibility. Having thus recognized Herbert & Micou as without fault, it must follow as a necessary sequence that it recognized their stock as valid and is estopped from asking for the cancellation of any of it bought by Davis.

Reid, under the guise of the company, having let out his friends Herbert and Micou, cannot attack Herbert & Micou stock held by Davis.

Parties are not allowed to take inconsistent positions in legal proceedings.

Am. & Eng. Enc. Law, vol. 7, p. 22.

Littel vs. Julius L[illegible] Furniture Co., 96 Va., 540.

If any stock, then, could be cancelled the above eleven shares must be deducted, leaving in Davis, only sixteen shares that could possibly be cancelled in any event.

Certainly all of the Micou stock cannot be cancelled when

he had paid something, certainly $1,200, not secret profits, for it.

VII.

It was error to decree that in addition to cancelling stock appellants, Davis and Phillips, should pay $1,546.54.

This was arrived at by charging them with $1,200 paid them by Micou, for "Herbert & Micou," and $1,333 paid Davis by Sowers for the Billings six shares (P. R., 235).

The company can make no claim for these two sums. It was not a party to the transactions nor in any way hurt by them.

Appellee claims that this objection cannot be made because there was no exception to the auditor's figuring.

This is an appeal from a decree, not from the auditor's report.

The court decreed that the company should have from Davis and Phillips $1,546.54 to arrive at which they were charged with, $1,200 and $1,333, that the company had no interest in, and it is submitted that where a decree takes from defendants and gives to the plaintiff what the evidence shows the plaintiff is not entitled to the point can be made anywhere.

The auditor's report was simply something the court directed for its own convenience. It is not an ordinary accounting of claims allowed or disallowed against an estate by an auditor settling accounts.

It was for the court to decree what was right and if in a case of this sort it had decreed against defendants that to which the plaintiff was not entitled the defendants can have it set aside on appeal.

In a case of this sort no exceptions to an auditor's report are necessary. It is for the court to decide on the evidence what its decree shall be. It cannot delegate this duty to the auditor.

Suppose the auditor had reported $1,000,000 against the defendants without any evidence to support it, and the court had so decreed. Would the defendants have to pay it because of no exception to the auditor's report? Would they have no right to appeal from the decree which had no evidence to support it?

The auditor was simply giving his opinion on certain matters for the benefit of the court. It was for the court to accept the auditor's views or not as it thought right. If the court erred in such matter the appeal is from the court's opinion and decree and not from the auditor's report.

Authorities Relied on by the Appellee Company.

The authorities relied on by the appellee company are unlike the case at bar. They were not cases where some members of the syndicate who formed the company attempted to use the company's name to sue for an alleged deception by some members of the syndicate on other members thereof. They were cases where the public was brought in as subscribers and were deceived or defrauded, as in the cases relied on of Yeiser *vs.* U. S. Board, &c., Co., 107 Fed., 840; Erlanger *v.* New Sombrero Phosphate Co., 3 App. Cases, 1218, and Gluckstein *vs.* Barnes (1900), A. C., 240.

All the cases relied on by appellee were cited in the Lewisohn case, *supra*, and many others, and the same contention was made in that case as was made below in the case at bar.

Counsel for the Old Dominion Copper Mining & Smelting Co. contended in their brief (page 49) as follows:

> "The syndicate members were to become stockholders and did become stockholders as joint adventurers *pursuant to the original plan*, and if the corporation had been composed only of them and the promoters, the corporation, as representing their collective rights, could have maintained their suit for the breach of the fiduciary duty of promoters."

But this court decided that under such circumstances, which were practically the same as in the case at bar, the contract and all the relations were matters entirely separate from the company, and it could not sue for any subordinate fraud between members of the syndicate.

As to the cases relied on and the contention that the company could sue for the benefit of a part of the syndicate, this court said:

> "The argument for the petitioner is that all would admit that the promoters (assuming the English phrase to be well applied) stood in a fiduciary relation to it, if, when the transaction took place, there were members who were not informed of the profits made and who did not acquiesce, and that the same obligation of good faith extends down to the time of the later subscriptions, which it was the promoters' plan to obtain. (In our case there was no intention and it was not possible to have other subscribers, as all the stock was taken by the syndicate or promoters, *my words.*)
>
> "It is an argument that has commanded the assent of at least one court, and is stated at length in the decision. But the courts do not agree. There is no authority binding upon us and in point. The general observations in Dickerman *vs.* Northern Trust Co., 176 U. S., 181, were *obiter*, * * * *Whether or not there was a subordinate fraud committed by Bigelow and Lewisohn on the agreement, as the petitioner believes, is immaterial to the corporation.*"

CONCLUSION.

It is respectfully submitted:

1st. That there was no cause of action in the appellee corporation, the deceit alleged to have been practiced being entirely personal to the syndicate and in no way injurious to the corporation.

It was to get certain property and give all its stock to the syndicate for getting it, whether it got less property at the price of $25,000, or more at the price of $34,000.

The syndicate was to put in sufficient money to pay for the property and provide an expense fund of $5,000. So far as the corporation is concerned, the syndicate fulfilled all conditions and did all they were required to do. As this court has said, if there was any subordinate fraud committed by some of the syndicate on other members thereof, that was purely *"a matter between them and the syndicate."* Old Dominion Copper Mining Co. *vs.* Lewisohn, *supra.*

2d. If the corporation had cause of action, then Herbert and Micou, who were within the jurisdiction of the court, should have been made parties and not cast, practically, the entire burden on Davis, their partner in the entire transaction. Equity and justice required this, and the corporation, through Reid, who owned and controlled it, should not be allowed to single out Davis and Phillips, and shield Herbert and Micou because they were Reid's friends.

3d. This was not a case for cancellation of stock. Such relief will work hardship and injustice. The proper relief, if any, is to restore the money taken by each, since only a part were made defendants.

4th. There can certainly be no cancellation of the twenty-five (25) shares of promoters' stock, part of the $60,000

held by Davis, which was provided for in the written agreements and about which there was no secrecy.

5th. If there can be cancellation of assessable stock it cannot apply to the eight shares Davis purchased from "Herbert & Micou," through Micou, for the corporation, by not making either Herbert or Micou defendants, recognized them as free from fault and hence cannot question the validity of their stock. This leaves only sixteen (16) shares of assessable stock in Davis which can be cancelled in any event.

6th. There can be no decree against Davis and Phillips for $1,546.54, because, to arrive at this sum, Davis and Phillips were charged with $1,200, received from Micou, who was their partner, familiar with and sharing in the whole transaction, and with $1,330 received by Davis from Sowers. The company was not interested in either of these transactions.

SAMUEL A. PUTMAN,
J. K. M. NIRTON,
Counsel for Appellants.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 87.

NORMAN H. DAVIS and CHARLES T. PHILLIPS, *Appellants*,

v.

THE LAS OVAS COMPANY, INCORPORATED, *Appellee*.

BRIEF FOR APPELLEE.

The facts of this case are substantially as follows:

In the latter part of January or the first of February, 1904, the appellants, in the city of Washington, informed Gen. George C. Reid that they had an option on 4,000 acres of land in Cuba, belonging to Madam Acosta, the widow of one Tarafa, sometimes referred to in the record as Madame Tarafa, at the price of $25,000; that they proposed to form a stock company for its purchase, of which 60 shares were to be promoters' stock, going partly to

them and in part to the law firm of Herbert & Micou, but telling him nothing of any other profit than their said promoters' shares (Rec., p. 25). This project of the formation of a corporation to take the land had been formed before Reid was approached (Phillips, 166). A prospectus was drawn up by Phillips, set forth at pp. 46-7 of the record, stating that it was proposed to form a company with a capital of $150,000 to develop the 4,000 acre tract of land, which would cost $25,000, one-half of the purchase money to be paid in cash and one-half in 12 months; that $5,000 would be necessary for the expense of exploitation; that the promoters were to receive 40 per cent of the stock, the remaining $90,000 of the stock to be given to those who should subscribe the $15,000 then needed, and obligate themselves to pay the remaining $15,000 if found necessary.

At or about the same time a subscription agreement was drawn up by Phillips, a copy of which, incomplete as to signatures, is to be found at pp. 47-49 of the record, stating that Phillips, Davis and the firm of Herbert & Micou had secured an option on the 4,000 acre tract; that they were to acquire the tract for a company to be organized for the sum of $25,000, $12,500 payable in cash on delivery of the deed and $12,500 in 12 months, the total capital stock to be $150,000, 40 per cent of which was to be given to Phillips, Davis and Herbert & Micou "as compensation for securing the land and the preliminary work of getting up and incorporating the company afterwards to be organized," the remaining $90,000 of the capital stock to be disposed of to the subscribers at one-third of its face value, or $30,000, $25,000 of this money to go to the purchase of the land and $5,000 to be used as an expense fund, as directed by the company, for the purpose of effecting sales of the lots, etc., the persons who were to receive the pro-

moter's shares to bear the expenses of a trip of a representative of the subscribers to examine the land, etc. The copy of this agreement introduced in evidence (Record, pp. 47-9) shows its subscription by Phillips and Davis for the entire 60 shares of the promoters' stock, with an additional 10 shares subscribed for by Phillips, 10 shares by Davis and 30 shares by Reid, the original of which agreement was also signed by Herbert & Micou (Davis, p. 86), and by one Billings (Phillips, 167; and see Reid, 40), the last named participating, also, in the selection of Micou to visit Cuba and examine the land as the representative of the subscribers (Record, pp. 26-7).

It will be noticed that in this, the written contract between the parties, upon which their several subscriptions were sought and obtained, the 40 per cent or $60,000 of promoters' stock was to be given *"as compensation for securing the land,* and the preliminary work of getting up and incorporating the company."

Immediately after the presentation of the foregoing prospectus and the signing of the foregoing contract, Phillips, Davis and Micou, according to the testimony of the appellants, went to Richmond for the unsuccessful purpose of endeavoring to secure a further subscription from Governor Willard, and while there an agreement, set out at p. 87 of the record, was entered into between them, reciting that Davis and Phillips had an option on the land for $15,000, and that any sum in excess of $15,000 paid for it by the proposed corporation or the subscribers to its capital stock should be equally divided between Davis, Phillips, and Herbert and Micou, one-third to each, or, if the parties should take stock in the corporation instead of money for the whole or any part of the excess over $15,000 to be paid by the corporation for the land, then the stock should in like manner be divided, two-thirds to Phillips and Davis and one-third to Herbert & Micou—the agreement bearing date February 5, 1904.

At the time of these transactions, the option held by Phillips and Davis was for 4,000 acres of land, for the price of $10,000, instead of $25,000, as represented to Reid and Billings, and instead of $15,000, as represented to Micou (Davis, 84; Phillips, 165).

After the contract was made in Washington, it was discovered through the employment of an expert (Rec., 88-9), at the expense of the corporation p. 223), that the land covered by the Davis-Phillips option did not include the best land; whereupon that option was abandoned, and on March 16, 1904, new options were obtained pursuant to an agreement between the parties concerned, including Gen. Reid, through Tarafa, son of the widow Acosta, covering the whole Tarafa tract of about 8,000 acres, for $25,000, or a portion of it, of 5,000 acres, including the better land north of the railroad, for $19,000, or that portion with a lakeland addition of about a thousand acres for $22,000. (Record, 50, 52, 89-90.) On March 24, 1904, a censo of $5,400 was discovered as possibly encumbering the land, in consideration of which the widow Tarafa abated $2,000 from the option of $22,000 above noted, and on the following day, March 25, 1904, she made a deed of the land covered by her $22,000 option, thus reduced in price to $20,000, to one Escalante, an employee of Davis and Phillips (Rec., 93) for the sum of $20,000, of which $5,000 was paid her in cash, and a mortgage taken for $15,000, payable in one year from that date. On the same date, Escalante conveyed the same land to Micou for an expressed consideration of $35,000, taking a further mortgage from Micou to himself of $2,500, payable in one year, with interest at 10 per cent per annum, which mortgage he took simply as the secret agent of the appellants, as a part of their secret profits, having himself no interest in it whatever, and being a man without property or resources (Rec., 112, 131).

Some few days prior to this consummation of the purchase, Gen. Reid, Phillips, Davis and Micou had agreed to the purchase of the 5,000 acres, not including the 1,000 lakeland addition, of which Gen. Reid had not then heard, which purchase it was represented to Reid by Davis and Phillips would cost $34,000; and, being under the necessity of going to Guantanamo upon official business, without waiting for the consummation of the transaction, Gen. Reid agreed with Phillips, Davis and Micou that each should put up his check for his respective proportion of $17,000, which it was represented to Reid would be the one-half of the purchase price of the land then payable in cash, Davis agreeing to provide for the shares of the stock subscribed for by Billings, to be divided later *pro rata* among the parties if Billings should fail to take them. Reid accordingly gave his check for $6,611.15 (Rec., 27), which was his *pro rata* share of the cash payment to be made pursuant to a new agreement entered into between the parties, dated March 19, set out at pp. 90-91 of the Record, to the effect that they had agreed to purchase 5,000 acres of land, more or less, the property of the widow Tarafa, for the sum of $34,000, to be paid half in cash on delivery of the deed and the other half in twelve months, the 40 per cent of promoters' stock to be divided, $15,000 to Reid, $15,000 to Herbert & Micou, $15,000 to Davis and $15,000 to Phillips, the remaining [redacted] of stock to be subscribed for by the parties signing the agreement, "each one agreeing to pay sufficient money to pay for half of the land now and the balance at the maturity of the mortgage," with an additional expense fund of $5,000, Phillips subscribing for 22 shares of the stock, Reid 35 shares, Micou 17 shares, Davis 10 shares, and Billings 6 shares which, if not paid for, the other parties would take pro rata, the property to be placed in the name of Micou, who was to convey to the company

as soon as it was formed, "and Mr. Micou hereby acknowledges receipt of the checks of the different promoters for the stock that they have subscribed to." (Record, pp. 90-91.) The checks thus given Micou by the appellants were mere blinds, for the purpose of deceiving Reid, with no intention that they should be presented for payment or paid, and they never were. (Rec., 181-3.) "We were not really putting up any money." (Rec., 111.)

The re-division of the promoters' stock was in accordance with the refusal of General Reid to go further with the matter unless he was allowed as much of that stock as Herbert & Micou, in view or the fact that he had come to Cuba to examine the land, and was putting up more money for the enterprise than any of the other parties (Record, pp. 38, 89-90, 109-110, 168-9).

This latest agreement, dated March 19, 1904, signed in Cuba as above noted (Record, pp. 90-91), recites that Micou had received "the checks of the different promoters for the stock that they have subscribed to." General Reid's share, on this basis of $34,000 to be paid for the 5,000 acres then contemplated to be purchased, was $6,611.15, being 35/90 of $17,000, the alleged one-half of the purchase money for the 5,000 acres which the appellants represented was to be paid in cash. Phillips put up his check, on the like basis, for the 22 shares subscribed for by him, Davis put up his check, on the like basis, for the 10 shares subscribed for by him, and Micou put up his check, borrowing $1,500 from Reid for the purpose of enabling him to make his share of the payment (Phillips, 181-3)—and yet the only money to be paid, or which was actually paid, was $5,000, one-fourth of the $20,000 for which the property was in fact being sold by Mme. Acosta. Reid understood, as all the parties knew, that all the checks were to be cashed, and that $17,000 would be paid to Madame Acosta (Phillips, 181-183; see Davis, 110-12; Reid, 27).

As a matter of fact, Reid's check, alone, paid the entire $5,000, the whole and only cash payment, and left a surplus of $1,611.15. Micou, who, the testimony of Davis and Phillips alleges, knew the real history of the transaction, borrowed $1,500, for the expressed purpose of making up the amount necessary to be paid by him, from General Reid, who gave him a check for it, $300 of which amount was refunded to Micou by Phillips, who cashed the check, and the remaining $1,200, added to the $1,611.15 left over from Reid's check, was divided by Phillips and Davis as "profits"—the $1,200 cash payment made by Micou being due from him, as between himself, Phillips and Davis, in consequence of the fact that he had subscribed for more stock than his due share of the "profit stock" (Davis, 110-11, 116, 133). The $1,200 thus paid by Micou was, therefore, not intended to go into the purchase of the land, nor in any manner for the benefit of the company, and did not do so.

In other words, having contracted for 17 of the 90 shares of the assessable stock of the company, and to pay his *pro rata* share of the alleged $17,000 necessary to make the cash payment of the purchase money, which share would have been $3,211, he pays, according to the appellants' testimony, $1,200 to be divided among them as secret profits, pays nothing to or for the Company, and yet receives from the Company, when organized, his seventeen shares, issued to him by it under the belief that he has in good faith paid therefor to it, or for its benefit in the purchase price of the land, the $3,211 agreed to be paid as the first instalment of fifty per centum of the consideration for the 17 shares.

On the return of General Reid from Guantanamo, a few days after the transaction with Mme. Acosta had been closed, Micou having then returned to Washington, Davis stated to him that an additional 1,000 acres, including the

lake, had been offered by Mme. Acosta for $1,000, and proposed that he, Phillips and Reid might take this 1,000 acres as a "side issue," to which Reid replied that the company should have the option to take it, and this was ultimately agreed to (Reid, 28-9; Davis, 92-3; Phillips, 170), Reid and Sowers being really, and the others ostensibly, assessed to make up the additional $1,000 (28-9, 223-4). As a matter of fact, this 1,000 acres, with the lake, formed a part of the tract which Mme. Acosta conveyed to Escalante on March 25, 1904, the price of which was included in the $20,000 to be paid to her, the cash installment for which had been actually paid her; and it formed, also, part of the tract conveyed by Escalante to Micou on the same day.

It had formed a part of the tract, embraced in the alternative option noted above, for $22,000, and its addition grew out of the fact that a *censo* or encumbrance upon the land had been discovered, in consideration of which Mme. Acosta had abated $2,000 of the option upon that tract and sold the 6,000 acres, including the lake, for $20,000, instead of the 5,000 acres for $19,000, which the parties had elected to take, by their March 19th agreement (Rec., 51, 65).

In May or June, 1904, Davis and Phillips visited Washington, and in the latter month (29) the complainant company was organized. During this visit, Billings electing not to take the six shares which had been subscribed for by him, Davis sold the subscription to Dr. Z. T. Sowers, stating to him that Billings could not pay for them, that Sowers could have them at the same price which Billings was to give and which all the stock had cost, coming in on the same footing with all the others, namely, on the ground floor; that the land cost $35,000, with $1,600 for expenses, to be paid proportionately, and that the proportional cost

of these 6 shares would be $1,333.33, for which amount Sowers gave him his check (Record, pp. 20-21). He further represented that the widow Tarafa had had to mortgage her property, that she had nothing but land and was compelled to have cash, and for this reason had sold this part of the estate, and that Sowers was in on the same footing with everybody else, giving the same price that everybody else had paid, and exactly the same price that the stock had cost Davis (Record, p. 21; and see Reid, 32); that $35,000 was the very lowest price that the land could be bought for, that they were very fortunate in getting it on such terms, and that it had cost the company $35,000, with an extra $1,600 divided up pro rata among the stockholders (21-2). This transaction occurred in May, 1904 (Record, 20). No money was at any time paid for or on account of the Sowers stock except that paid by him, and the stock was never issued to anyone other than himself. In other words, he was one of the original shareholders—his payment of the $1,333.33 preceding the incorporation of the company, and the application for the charter being signed by him as one of the original incorporators. See Rec., p. 217.

With respect to the allegations in the answers that Reid had assisted Davis to sell this stock to Sowers, the latter testified that Reid had nothing to do with the purchase and knew nothing of it until after it had been made (Record, p. 21), which statement is confirmed by Reid (Record, 33), and the charge is retracted by Davis (Record, p. 96).

The interposition of Escalante into the matter, as grantee of the Widow Acosta and the grantor of Micou, is alleged in the answers to have been resorted to on the advice of counsel that, because of the discovered censos, it was advisable to have an intermediary of the grant. The attorney in question, one Mendoza, testifies in chief that Madam Acosta, the vendor, insisted upon a reference to the censos

in the conveyance executed by her; that a conveyance to the ultimate purchaser which should not refer to the censos was desirable because, under such a deed, the purchaser might more readily disclaim payment of or liability for them, and that, upon his advice, while the deed from Madam Acosta to Escalante expressly referred to the censos, the subsequent deeds from Escalante to Micou and from Micou to the Company stated, only, that there were censos of which the purchaser was cognizant (Record, 65-6). On cross-examination, however, he admits that, if Micou had taken the property directly from Madam Acosta, and had then conveyed it to the Company, by a deed not acknowledging the censos, the Company would have been in the same position with respect to them as Micou was after he received the deed from Escalante (Record, 69); and, while the answers disingenuously assign only the reason stated in them for the appearance of Escalante in the transaction, Davis in effect admits (Record, 113-114), and Phillips, after much evasion, finally confesses (Record, 190), that his introduction was for the purpose of concealing from the other parties in interest the secret profit which was being made, at their expense. Mendoza, also, states that, besides the advantage of having an intermediate purchaser for the purpose of facilitating the non-acknowledgment of the censos, "the second reason was, as I believe, that Escalante was buying for one price and selling for another." (Record, 66-7.)

The fact of the deception practiced upon the innocent stockholders and upon the corporation, it will be observed does not depend for its establishment upon the relative credibility of the witnesses for and against the defendants. It is nowhere more plainly shown than by the testimony of the appellants themselves. (See Davis Record, 102-3, 105-8, 110, 111-12, 114, 115; Phillips, Record, 175-7, 180-3, 184, 185, etc.)

General Reid having been told at the time, and Dr. Sowers later, that the land had cost $35,000, that $17,500 had been paid in cash, and that the residue of the purchase money was represented by two promissory notes secured by mortgage, one for $15,000 held by Madam Acosta, and one by Escalante for $2,500, both drawing interest at 10 per cent per annum, payable quarterly, the appellant Davis, on behalf of himself and his associates in the deception practiced, proceeded to collect the interest on the $2,500 mortgage by representing that Escalante was demanding it, that he, Davis, was being importuned for it, compelled to advance it, and the like. (See letters of Davis of February 17, 1905, Record, 121-2; February 21, 1905, Record, 114, 115; May 2, 1905, Record, 161; the alleged Escalante letter, Record, 158—Escalante being unable to speak or write the English language; Davis, Record, 113.) As a matter of fact, Davis, himself, received and appropriated to his own use the moneys thus collected as interest on the $2,500 mortgage (Record, 112, 113-14, 122), and the entire principal when it was paid, in March, 1905. The question of fact between himself and General Reid as to whether he represented Escalante to Reid as one of the owners of the property, and as a member of the Acosta family, is settled by his own letters to Reid, produced in evidence. (Record, 114, 121.)

As late as January, 1905, the Company had been unable to procure possession of the deeds to the property, although writing to Davis several times for them, on which account General Reid was sent by the Company to Havana for the purpose of securing them. Notwithstanding Davis' statements, first, that he had given them to Micou, and then that he had given them to Phillips, both of whom were in the United States, General Reid eventually traced them into the possession of Davis, himself, unrecorded, and, on returning to the United States, left the deeds for record with

Arealiano, the notary, to be forwarded when recorded (Record, 29-30). Being unable still to receive them by correspondence, and the deferred payment approaching maturity, General Reid again came to Havana, in March, 1905, secured the deeds and took them to Major Runcie, an American lawyer in Havana, whose translation of them to him for the first time advised General Reid of the fact that the deed from Madam Acosta to Escalante recited a consideration of $20,000, while those from Escalante to Micou and from Micou to the Company stated a consideration of $35,000, which discrepancy Davis at the time undertook to explain by stating that a reduced amount was put into the first deed for the purpose of reducing the transfer tax to be paid to the Government (Record, 31-2). Though somewhat doubting this explanation, yet not knowing absolutely that the price was not really $35,000 (Record, 44), and being advised by Runcie that the fraud would be no defense against foreclosure under the laws of Cuba, he paid the mortgages, under fear that, if not paid, the vendors could take back the land, and the money which had been theretofore paid would be lost. (Record, 44.)

Some effort was made, by the testimony of the Cuban lawyer Mendoza, to show that a successful defense against the mortgages might have been made in Cuba, the testimony being that, upon institution of a criminal proceeding for the fraud, the criminal judge could have notified the civil judge to stop proceedings in foreclosure, and, if the criminal proceeding resulted in a conviction, the criminal judge would have enjoined the foreclosure permanently. (Record, 65, 69, 70.) The same lawyer states, however (Record, 68-70), that there was no basis for a criminal action on the face of the deeds, and no evidence was offered that the conduct of the appellees, fraudulent as it was,

would have formed the basis of a successful criminal prosecution under the Cuban law.

The entire principal of the $2,500 mortgage was appropriated, as stated, as the interest had been, by Davis to his own use. (Record, 112, 121.)

In January, 1905, according to the testimony of Davis, Micou informed him that Reid had learned of the actual cost of the property, was displeased, and that it would be better for Davis if Micou were eliminated from the transaction (Record, 131), the fact being that Reid knew nothing of the exaggerated or fictitious price until March, 1905, when the deeds were translated to him by Runcie, as above stated. Davis, however, in January, 1905, approached Reid with a statement that neither Micou nor Phillips could pay their assessments for the stock held by them, and that both would sell their holdings for exactly what they had cost them (Record, Kane, 203, 205; Reid, 211; Davis, 121), and proposed that he and Reid should purchase these shares, which was accordingly done. Phillips had sold ten of the shares held by him to Ricks and Parker, which ten shares had been bought in by the Company, and are treasury stock, his remaining twelve assessable shares being assigned by him to Reid and Davis, General Reid paying $1,800 for the shares which came to him (Record, 158), while Davis took the shares thus acquired by him from Phillips in some kind of settlement, of so uncertain a nature as to render him unable to state what they really cost him, or whether they cost him anything (Record, 131), Micou had received six of the fifteen shares of promoters' stock which went to the firm of Herbert and Micou, and had subscribed for seventeen shares, making twenty-three in all, of which Reid, under the representations of Davis, above stated, purchased twelve shares, paying $1,591 there-

for (Record, 58), while Davis took the remaining eleven shares, for which, and for Micou's alleged interest in the Escalante mortgage, he states he paid Micou $750. (Record, 131.) The purchase by Reid of his portion of the Phillips and Micou shares was upon Davis' statement to him (Reid, 211; Kane, 203-5) that the stock would be sold to him at its actual cost to Phillips and Micou, and the price paid was figured out by Kane, the Secretary of the Company, from data furnished by Davis for the purpose, as showing the actual cost to Micou and Phillips, respectively, the fact being that none of the stock had cost any of the parties anything, except the $1,200 which Micou had paid to Phillips and Davis, not for the land, nor for any purpose of the Company, but as a part of their secret profit in the transaction, and as the consideration for allowing Micou to take more of the agreed profit stock than his *pro rata* share thereof. Davis did not tell Reid that these parties had paid nothing for their stock, but allowed him to go on and buy it, upon Davis' representations above stated, Davis knowing that Phillips had paid nothing at all, and Micou only $1,200. The testimony of Davis, himself, to this fact will be found at page 120 of the Record. The data furnished by him to Kane (Rec., 223) represented Phillips, Micou and himself as having paid their full *pro rata* shares.

The following inaccuracies in the brief for the appellants will be noted:

At page 7, Davis and Phillips are represented as having secured the right to take an additional one thousand acres for $1,000, and to have allowed the company, after it was formed, to have this land without profit upon it, or upon the additional land embraced in the March 19th agreement;

the fact being that the option held by Davis and Phillips when in Washington in January, 1904, was abandoned, and a new alternative option, for different land, obtained through Romaguera, a broker, whose fee for the service was charged to and paid by the company (Record, pp. 111, 223), and the purchase of one of the tracts contained in it agreed upon by Reid, Davis, Phillips and Micou, by their written agreement of March 19, 1904 (Record, pp. 90-91), the remaining lakeland tract being added at an additional cost of only $1,000 because of the censos discovered against the entire tract, as above pointed out. Although the cash payment for the entire tract purchased, lakeland and all, was but $5,000, and was paid out of the $6,611.15 gotten from Gen. Reid by falsely representing to him that a cash payment of $17,500 was being made, Davis pretended that he had advanced $500, as one-half of the additional $1,000 charged for the lakeland tract, and actually assessed and collected this additional sum from the subscribers to the stock of the company to be formed (Rec., 28-9), against which company, when formed, it was duly charged (Rec., 223-4).

At page 5 of the brief it is alleged that "Hilary A. Herbert, the other partner, actually had some of the stock profit at the institution of this suit," while at page 13 it is further stated that "Herbert and Micou also received some of the cash undisclosed profits." There is not a syllable of testimony in support of these allegations. Herbert never, at any time, had any stock of the company except nine of the fifteen promoters' shares which were allotted to the firm of Herbert & Micou, nor is a single dollar of the cash profits pretended, or suggested, even, by any witness, to have come to his hands.

On the same page it is stated that, "after the last agreement, Davis secured a valuable lake property, adjoining the

above, for the sum of $1,000; this also he turned into the company afterwards formed, without profit." The fact is that the lake-land addition was embraced in the alternative option above procured by Romaguera (p. 56), at an added price of $3,000, this option being obtained on March 16th, three days *before* the "last agreement" in question.

So far from Davis having secured the lake property, the fact is that, after abandonment of the 4,000-acre option, the only one obtained by the appellants, upon discovering the unsatisfactory character of the land embraced in it through the services of an expert employed on behalf and at the expense of the future corporation, this lake property was embraced in the alternative option obtained for the proposed company by the Cuban real estate agent, Romaguera, also employed at the expense of and paid by the corporation (Rec., 223). This option was given March 16 (Rec., 56), and therefore was in possession of the parties three days before the agreement of March 19th (Rec., 90), electing to take the 5,000-acre option. How, after discovery of the censos, in addition to that named in it, the 6,000 acre option was substituted, at a reduction in price to $20,000, has already been stated. The option of March 16th was not only obtained by a real estate agent employed for and paid by the corporation, but was obtained two months after the complainants, by the agreement set out on pp. 47-9 of the Record, had become the employed agents of the future corporation, to acquire the land for it.

At page 20 of the brief, the bill is charged with omitting "the fact that 'Herbert & Micou,' partners, through Micou, shared in the secret profits," at p. 23, that "there is no question, no dispute, that Herbert and Micou participated with Davis and Phillips in all profits, secret and otherwise," and that Herbert and Micou disposed of their stock except

$9,000 of promoters' stock still held by Herbert," etc., that the cash secret profit, "was divided between Davis, Phillips, 'Herbert and Micou,' " and on p. 24 that Herbert and Micou were Davis' "partners in the whole transaction." An apparent consciousness of the unfair, disingenuous and unfounded character of this charge against Mr. Herbert is indicated by the fact that it is made, not against Herbert and Micou, but against "Herbert and Micou," as an idealized, artificial entity. As explicitly declared by the Court of Appeals (Rec., 249), where a like unfounded charge was made, "It is nowhere intimated in the record that Mr. Herbert knew, or had reason to know, of his [Micou's] participation in secret profits. Stockton vs. Henderson, 40 N. J. Eq., 486."

The very plain and simple facts in this connection are that Herbert and Micou were a firm of lawyers, and that Mr. Herbert as the senior member of the firm received nine of the fifteen shares allotted to it "for attending to the legal details incident to the business" (Davis, Rec., p. 86). Contrary to the allegations of the brief for the appellants—made nowhere else—he never received a single share or a single dollar of the secret profits; and that this was perfectly well known to Davis, even if the brief and discussion of the matter in the Court of Appeals unfortunately failed to secure the attention of his counsel, is shown by his own testimony as to the reason why, the manner in which and the person from whom he bought the Micou secret profit stock (Rec., 131). The Richmond contract between Davis, Phillips and Micou, though signed by the latter with the name of his firm, was not within the scope of a law partnership, and the record shows affirmatively was not understood by the appellants to have been known to Mr. Herbert. When confronted with this suit, and in the hope of using that contract as a means of inducing him

to interpose and stop it, Phillips wrote him, on behalf of himself and Davis and by the latter's authority, the letter, at pp. 221-2 of the Record, containing the following:

> "While we did make a profit on this transaction, it was in my opinion a legitimate one, and if you will call upon Mr. Putnam, our attorney, and ask him to show you the written agreement signed by Phillips, Davis, Herbert and Micou, Mr. Micou signing for your firm, you will see that whatever possible wrong could be charged to Phillips and Davis would also be made against Herbert and Micou. For our own part, I think it would be infinitely better for all concerned for this matter to be settled out of court."

The failure of appellants, by an appeal of this character, to influence the action of Mr. Herbert in his capacity of President of the complainant corporation, charged with the duty of protecting the interests of its stockholders, for whom it and he are trustees, was doubtless a disappointment to them, but, it is submitted, affords no justification for unfounded attacks upon him in the briefs filed on their behalf.

At page 14 of the brief, the transaction between Davis and Sowers is stated to have been a matter entirely between themselves, and that "the company had nothing to do with the transaction and had no interest in it." By reason of that proceeding, Sowers became, and remains, a holder of six shares of the capital stock of the company, constituting a liability against it, which it was misled into issuing by the misrepresentation of Davis that the money paid by Sowers for the shares had gone into the purchase of its land. Is it without standing in a court of equity to call its trustee or agent to account for the secret, illegal profit thus obtained by him, in violation of his duty and at its expense?

At page 13 of the brief, the corporation is represented as

having given all its stock to its promoters for the property, and that it was immaterial to the company what the property cost, because the syndicate had agreed to purchase it for the company, in consideration of its shares. But under no one of the several agreements between the parties was all the stock to be given, or taken, for the property, or for enough money, merely, to pay for it. Nor was Gen. Reid simply a promoter, nor was Dr. Sowers a promoter at all. The former, as to the thirty-five shares of assessable stock subscribed and paid for by him, was simply a shareholder, while the latter, who neither received or was to receive any promoters' stock at all, was always a mere shareholder. The company itself, which in good faith before discovery of the frauds bought and paid for the ten shares which Phillips had sold to Parker and Ricks, is itself entitled to relief, in its own interest and in its own right, against the fraudulent shares outstanding in the hands of the appellants.

POINTS AND AUTHORITIES.

It may somewhat clarify consideration of the case to determine, from the record, what questions are brought up by the appeal.

The paragraph in the conclusion of each of the answers of the appellants (Rec., pp. 12-13, 18) is to the effect that each, in answering, "does not waive the right given to him by the order of this Court passed in this cause on the 9th day of October, 1905, to renew his motion to strike the bill from the files and quash the writ of subpoena." It is fair to assume from these recitals, as is the fact, that, upon some ground or other, the defendants did move to strike the bill from the files and quash the subpoena, and that the motion was overruled, without prejudice to the right to renew it later. The motion, however, was not renewed, nor is any ground for the proposed action apparent upon the record.

The decree of the Supreme Court of the District of Columbia, from which the case was carried to the Court of Appeals, and from the decree in the latter court affirming it, the present appeal is taken, dealt only with specific exception to the Auditor's Report (Rec., 232 238, 239, 240), which exceptions it overruled, affirming the report and giving effect to its findings. The question, discussed at pp. 7 to 10 of the brief for appellants, that the institution of the suit was not authorized by the corporation, is, therefore, not presented by the appeal.

Pages 10-14 of the brief for appellants are devoted to the question whether or not the bill was defective for want of parties, in that the members of the firm of Herbert & Micou were not made parties. This question, also, is not raised by the pleadings, by motion before the Auditor, by the exceptions to his report, or in any other manner, and, therefore, we submit, is, also, not presented by the appeal.

After considering and deciding adversely to the appellants both the foregoing questions, as though they had been properly raised, the Supreme Court of the District in its opinion (Rec., pp. 225-31) held:

1. That the defendants should account for the secret profit received by them, such secret profit being the difference between the amount paid to the Widow Acosta, and that paid by the complainant for the land in question, with interest from the date of the receipt of such profits, less any amounts paid out by them in securing the land or in forming the corporation.

2. That the complainant, at its election, might recover the secret profit as money, or might follow it in so far as it went into the stock of the Company, in which latter case the shares representing such secret profits should be delivered up and cancelled.

3. That the defendants should not be required to sur-

render for cancellation the promoters' stock received by them.

4. That the cause should be referred to the Auditor to ascertain the net amount of secret profits, and the proportion thereof invested in the stock of the plaintiff now held by the appellants, or either of them.

The Auditor (Rec., pp. 232-35) found the appellant Davis to be the holder of 49 shares, 22 of which were promoters' stock; that the remaining 27 shares represented secret profit, and that, over and above them, there remained the sum of $1,546.54 of secret profit to be accounted for in money.

The appellee, by its exceptions, raised the question as to the right of the appellants to any of the promoters' shares, which question the Court of Appeals decided in its favor, decreeing their surrender and cancellation.

The appellants by their exceptions, which will be found at pp. 229-40 of the record, raised the following questions, and none others, namely:

(1) That the Auditor erred in finding Davis the owner of 22 shares of promoters' stock and 27 assessable shares, instead of 25 shares of promoters' stock and 24 assessable shares, as claimed by him—this question being the substance of the first, second and third exceptions on behalf of the appellants.

(2) That the Auditor erred in finding that the 27 shares represented secret profits, "while the record shows that the defendants paid a large sum of money into the treasury of the complainant company as assessments or payments for said shares of stock"—this being the fourth exception taken.

(3) That the report "does not give defendants credit for large sums of money shown by the record to have been paid by them as expenses in the organization of complainant company, and for which they have never been reimbursed" —this being the fifth and final exception taken.

That, in this jurisdiction if not elsewhere, exceptions so indefinite and general as the appellants' fourth and fifth, being propositions 2 and 3, *supra*, are insufficient, and must be overruled is well established by the decisions of our courts. Haller vs. Clark, 21 D. C., 128, 133; Richardson vs. Van Auken, 5 D. C., App., 209; Smith vs. American Bonding Co., 12 D. C., App., 192.

In addition, the testimony of Davis, himself (Record, 111), shows that all expenses of the organization of the company were charged against it by him, and paid to him by it, except the expenses of Phillips and himself in coming to Washington, in January, 1904, for the purpose of attending a stockholders' meeting of the Colonial Trust Company—on the ground that, though coming to Washington for that purpose, they had embraced the opportunity, while here, of getting up the Las Ovas enterprise, upon the fraudulent basis which has led to the present litigation, and were, therefore, entitled to credit for the expenses in question. Notwithstanding this admission, and the evidence of the fact contained in the Record (p. 223), the brief for the appellants here still contends (p. 32) that the decree below was erroneous for failure to allow expenses.

No assignment of error referable to either the fourth or the fifth exception being contained in the brief, nor any argument made therein in support of them, they are doubtless to be regarded as abandoned. The Auditor's Report (Rec., 235) expressly credits all assessments paid and allows the appellee only the excess of the secret profits above them.

At pp. 14, 34, of the opposing brief, it is objected that the appellee had nothing to do with the $1,333 of profits made by Davis on the sale to Sowers. No such objection was in any manner, however remotely, made before the Auditor, or raised by the exceptions to his report. It is made for the first time, in the appellate court. It is elementary

that this cannot be done—this in addition to the fact above noted that the result of that transaction was to place into the hands of Sowers, an innocent holder, six shares of the capital stock of the company, of the par value of $6,000, for which it is liable to him and for which with the exception of some later assessments paid by him, the company received nothing.

Judge Gould having held that the so-called promoters' stock was not invalidated by the fraudulent conduct of the promoters, the appellant Davis not unnaturally sought to claim that the largest possible share of his holdings was promoters' stock. It was contended for him, accordingly, that, in addition to the 15 shares of this stock which went to him under the agreement, he should have been credited with seven shares of the stock purchased by him from Phillips as non-assessable, which credit is given by the Auditor's report, and that, in addition, three of the six shares acquired by him from Micou should be regarded as of this class, making 25 shares in all. Micou, it is true, had six promoters' shares, which with his 17 alleged assessable shares, making 23 in all, he sold to Davis and Reid under the circumstances above set forth, Davis getting 11 and Reid 12. There is nothing to show that these shares were physically distinguishable in any way, or, upon any other principle than arbitrary assumption, that Davis got three or any other number of them in the shares purchased by him.

The three disputed shares, it will be noted, are a part of those acquired by Davis from Micou. The undisputed fact is found by the Auditor that, of the 23 shares which went to Micou, six of which were promoters' shares, Davis sold 12 to General Reid and retained 11 for himself. The contention on his behalf is that, since he testified that three of the eleven were promoters' shares, and was not contradicted in rebuttal, it should now be adjudged by a court of equity

that three of the eleven shares thus acquired by him from Micou, paying only $750 for them all and for a share in the Escalante mortgage besides, should be adjudged promoters' stock, and that, of the 12 Micou shares sold by Davis to Reid, three should be adjudged to have been fraudulent shares, though their sale was made to Reid, as Davis admits, with full knowledge upon his part, and without any knowledge upon the part of Reid, of their fraudulent character, and of every fact and circumstance which made them so, as now disclosed by the record. Indeed the testimony of the witness Kane (Rec., 203) shows that the price to be paid for these shares was figured up by him upon data furnished by Davis as to their cost to Phillips and Micou, which data (Rec., 223) represented Phillips as having contributed $4,277.80 and "Micou"—not Herbert and Micou—as having contributed $3,305.57, an aggregate of $7,583.37, toward the cash payment for the land and the lake addition —the cash payment having been in fact only $5,000, and for which, including the lakeland assessment, $6,705.59 was gotten from Reid.

A very simple test is, suppose Micou, selling the 12 shares to Reid, had himself retained the remaining 11 shares; could he have been heard in a court of equity to claim, under the circumstances, that three of the twelve shares thus sold by him to an innocent purchaser were fraudulent, and, therefore, that three out of the 11 which he retained were good? And, if not, does Davis, who made the sale of the 12 shares to Reid, and himself acquired the 11 shares, with full knowledge of all the facts at the time of the transaction, stand in a better position than Micou would do if he had retained the 11 shares?

We submit that, if the Court of Appeals erred in reversing so much of the decree below as gave the appellants their promoters' stock, and if the question, therefore, were

material, the seven so-called promoters' shares obtained by Davis from Phillips should, also, be treated as assessable shares, upon the like principle. Knowing that Phillips had, at the time of the sale, but 27 shares in all, 15 of which were to his knowledge secret profit stock, he negotiates a sale of 14 of the shares to General Reid, an innocent purchaser for value, rendering them in Reid's hand valid outstanding liabilities of the Company, and, having done this, he simultaneously takes Phillips' remaining 13 shares, with full knowledge of all the facts. If Phillips had retained these 13 shares, under the circumstances stated, would he have been heard to say, in equity, that he had sold the invalid shares, either wholly or in part, to Reid, and was therefore entitled to have the retained shares, or any of them, treated as valid in his hands, in addition to those rendered valid as against the Company by his fraululent sale of them to an innocent purchaser, on the express representation that he had paid for them? And. if not, is Davis, who knowingly made the misrepresentation upon which Reid bought, and who simultaneously acquired the other 13 shares, knowing all the facts, and in such a way that he is unable to show what, if anything, he paid for them, in any better position?

If the Court of Appeals, however, was correct in holding that the appellants were no more entitled to retain their promoters' than their secret profit shares, as we submit it was, the above discussion becomes immaterial.

The theory upon this point of the District Supreme Court (Record, pp. 229-31) was that the promoters' shares were not secret, but known to all the parties in interest; that the appellees contributed to the enterprise the option on the land, and that it would not be equitable to deprive them of compensation therefor.

On the other hand, it is submitted on behalf of the appel-

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Lees, as to the first of these grounds, that the right of persons occupying a fiduciary character to compensation for their services does not depend upon the question of secrecy of acquisition, but upon that of good faith; and as to the second, that, by the very terms of the subscription agreement, prepared by the appellee Phillips (Record, pp. 46, 106) and fully known to the appellee Davis (Record, p. 106), the promoters' stock was to be given them "*as compensation for securing the land and the preliminary work of getting up and incorporating the company after it was to be organised*"; that the theory that the promoters' stock was to be given them for the option which they held not only finds no support in the testimony, but is negatived by the express terms of the subscription agreement—prepared and presented by themselves, as stated. Not only so, but as shown by their own testimony, the option which they held was for land south of the railroad, which was found, after the subscriptions to the agreement were made, to be inferior and the option to purchase it, which was the only option they possessed, was abandoned; that the option upon which the enterprise really proceeded was one subsequently obtained, for different land, and at the cost of the appellee, on the 16th of March, more than a month after the subscription agreement had been signed, the record being really without any testimony to show that the original option, upon the land south of the railroad, possessed any value, and it being admitted that nothing had been paid for it.

Under the theory of the opinion below, and as the result of its decree, the appellee and the appellants would be left in precisely the same situation as if the latter had acted in good faith throughout the transaction, had acquainted the appellee and its stockholders with the true cost of the land, had attempted no fraud against them, had honestly and legitimately performed their duties, and had not subjected

it to the present protracted and expensive litigation to defeat their now plainly proven and uncontested frauds. Such, we submit, is not the doctrine either of the law or of the equity courts.

Suppose, instead of promoter's shares, the subscription agreement had provided that the promoters should receive, say, 40 per cent of the net profits which should be realized upon the adventure; that they had pursued the same lines of conduct which are shown in the record, that $20,000 of net profits had been realized, and that the present contention were, Are they entitled to the agreed percentage or commission upon the profits for their services? Can there be a moment's hesitation or question over the determination of such an inquiry? Is it not elementary law, fixed beyond even the propriety of discussion, that neither a trustee, an agent, nor any other fiduciary is entitled to compensation for his services where he has been guilty of concealment, misrepresentation, and the grossest attempted frauds upon his principals or *cestui que trustent*, for the purpose of overreaching and despoiling them, and of enriching himself at their expense? And, if so, can there be any difference whether his compensation was fixed by the contract at a percentage of the profits, or a percentage of the proposed capital stock of the corporation?

We submit that, by the very terms of the contract under which the appellants were to receive any promoters' stock at all, it was to be in consideration of, and as their compensation for, the securing of the land and the organization of the company; that the law inexorably applies to the right to receive such compensation the condition that the duties of the agent or fiduciary shall be performed honestly, and forbids it where the services are accompanied by secret, dishonest and fraudulent practices, at the expense of the principal or other contracting party; that the appellants, accordingly, are not entitled to their promoters' stock, contracted

to be given them for the proper performance of their duty; that it is contrary to public policy, and to the settled principles of both law and equity, that a trustee or agent may experiment, fraudulently, for a known illegal and unjust advantage, retain the benefits of his fraudulent conduct if undiscovered, and, if detected, nevertheless receive all the benefit of his contract to which he would have been entitled had he acted honorably and in good faith, suffering, only, the loss of his unlawful embezzlement or misappropriation of the moneys coming into his hands through the trust and confidence reposed in him, and that so much of the decree below as permitted the appellees to retain their promoters' stock, under the undisputed facts and circumstances of this case, was erroneous and was properly reversed.

If the Court shall be of opinion that the other questions discussed on behalf of the appellants are properly to be considered upon the record in this cause, those questions are the following:

I. Should the suit have been dismissed, as not properly authorized?

II. Should the bill have been dismissed because Herbert and Micou were not made parties?

III. Was the appellee competent to maintain the suit?

I.

The institution of the suit was authorized, as pointed out in the opinion of the Court below (Rec., p. 227), by the unanimous direction of the Board of Directors at the meeting held June 28, 1905, Hilary A. Herbert, the President of the corporation, being present and concurring. The objection is that Davis, who resided in Cuba, and who was one of the parties to be proceeded against, was a director, and was not notified to be present at this meeting (202). He

had expressly declared that it was not necessary to send him notices of the meetings of the Board, as he could not come to Washington to attend its special meetings (202-3).

Conrad Reid, the only director other than Davis absent from the meeting referred to, had been present at an earlier meeting where the same action was taken, and all the directors were in favor of bringing the suit (Rec., p. 334). The action of the directors at these two meetings will be found at page 218 of the record. The president, who concurred in the authorization, was by the by-laws empowered to perform all the duties incident to the position of Chief Executive Officer of the Company, or required by law (Rec., p. 218). This included the right to employ counsel and authorize suits. Russell vs. Savings Bank, 23 App. D. C., 398.

That the authority of the president of a corporation, alone, is sufficient for the employment of counsel in the institution of suits, is abundantly established. Beebe vs. Beebe Co., 64 N. J. L., 497; Dallas Co. vs. Crawford, et al., 18 Tex. Civ. App., 176; American Ins. Co. vs. Oakley, 9 Paige, 496; Reno Water Co. vs. Leet, 17 Nev., 203; Streeten vs. Robinson, 102 Cal., 542; Mumford vs. Hawkes, 5 Denio, 355; Ricord vs. R. R. Co. 15 Nev., 177.

He may even employ counsel and authorize suit against the Board of Directors, itself. Recamier Mfg. Co. vs. Seymour, 5 N. Y. Supp., 648:

> "When the president of a corporation executes, in its behalf and within the scope of its charter, a contract which requires the concurrence of the board of directors, and the Board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified his act." Railway Co.'s vs. Bridge Co., 131 U. S., 371, 381.

In the present case, not only was the suit authorized by the president and every officer and stockholder of the cor-

poration except Davis and Phillips, the parties to be sued, but the Company has prosecuted the suit for seven years, including its successful appeal to the Court of Appeals from so much of the decree of the lower court as held it liable to the appellants for their promoters' stock.

Even if the two meetings of the Board of Directors at which the suit was directed to be brought were technically invalid because of failure, under the circumstances, to give Davis notice, and thereby prevent suit by warning him to keep out of the jurisdiction, the fact remains that the suit was authorized by every officer and director except Davis, and by every stockholder except Davis and Phillips, the parties to be proceeded against. The claim that such a suit can not be authorized except by a duly called meeting of the Board of Directors is not supported by any authority.

II.

Should the bill have been dismissed because Herbert and Micou were not made parties?

To this objection there are several answers.

With respect to Mr. Herbert, he received, as the senior member of his firm, 9 of the 15 shares of the promoters' stock to be allotted to it "for attending to the legal details incident to the business" (Davis, p. 86). Contrary to the allegations made first, and only, in the brief of the appellants, he never received a single share of the "profit stock," nor any of the "cash undisclosed profits." Not the slightest cognizance upon his part of the wrongdoing of the appellants, or of any one else, and still less of any participation by him in it, is anywhere pretended, or suggested, by any witness in the case, nor is there a shred of evidence in the voluminous record which can afford the slightest ground for doubt or suspicion against his integrity, throughout the

entire transaction. Nor are the appellants, or either of them, charged by the Auditor's report, or by the decree, with any accountability, however remote, for his shares.

That the consideration for which the shares of promoters' stock were to be allotted to his firm was rendered faithfully and honestly, in so far as he is concerned, is unquestioned. Can technical responsibility for the misconduct which the appellants allege his partner participated with them in committing, and which was clearly outside the partnership scope, constitute in a court of equity a defense to them against accountability for their own conceded fraudulent, secret profit derived from it?

In the second place, with respect to Mr. Micou, the complainant neither knew nor had cause to suspect at the time of instituting its suit, nor did the appellants advise it by their answers, that he was in any way concerned with any of the fraudulent practices which had been employed. The knowledge of the appellants in that regard was possessed by them as fully at the time of their answers as at the present time. The rule is well established that objection for want of parties must be made at the earliest practicable time, and that it will be disregarded, at least except in the case of indispensable parties, if not then made. Dios vs. Burchard, 10 Paige, 447, 458-9; Mechanics' Bank vs. Seton, 1 Pet., 306; Weightman vs. Critic Co., 4 D. C. App., 153; Landram vs. Jordan, 25 D. C. App., pp. 299-300. It is nowhere [redacted] in the voluminous record, being first raised in the argument before Mr. Justice Gould.

In the third place, it is not contended that the assignment by Micou to Davis was not absolute and unconditional, vesting in the latter all the title that Micou had, and leaving no vestige of interest remaining in the assignor. Why, then, should he be made a party?

"The true principle would seem to be, that in all cases where the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignee, and the extent and value of the assignment is not doubted or denied, and there is no remaining liability in the assignor to be affected by the bill, it is not necessary to make the latter a party." Myers vs. Cottrell, 25 Wash. Law Rep., 721, citing Story's Eq. Pl., Sec. 153.

A and B fraudulently obtain from X a conveyance by X to B of Lot 1, which B then conveys to A. Can it be contended that B is a necessary party to a suit by X to set aside the deed?

In the fourth place, neither the report of the Auditor nor the decree appealed from charge the appellants or either of them with responsibility, or with liability, for any secret profits made by Micou, or any secret profit other than their own. They are required, simply, to surrender outstanding liabilities of the complainant corporation held by them the issue of which was obtained by their own fraudulent practices, partly to themselves originally, and partly to others from whom they acquired them with knowledge of all the facts, and that they account for any further secret profit in their possession, in money.

In the fifth place, could it benefit the appellants if Herbert and Micou were made parties? Suppose Micou were decreed to pay to the Company his secret profit, if any, realized by him in the transaction, or even that Mr. Herbert should surrender his 9 shares of promoters' stock; to what extent could that relieve Davis from the obligation to cancel the secret profit, which he holds, or relieve himself and Phillips from their liability to refund their secret cash profits?

With respect to an objection made below in argument, only, that the appellants should be required to make several, not joint, refund of their secret profits, it is, we submit, ob-

vious that, if the objection were before the Court upon the record, it is entirely untenable. With respect to the $1,200 obtained from Micou, it was paid to them, not in separate sums, but jointly. With respect to the secret profit made by Phillips out of his sale to Reid, the sale was broached, negotiated and consummated by Davis, upon whose misrepresentation that the price was the actual cost of the stock to Phillips, the profit was realized. They were partners in the perpetration of the frauds, throughout, and cannot claim the technical protection of a several liability because of any subsequent division among themselves of the proceeds of their joint transactions, even if they had made disclosure or claim thereof in their answers or in their testimony, which, however, they have not done.

III.

The remaining question, also not raised by the pleadings, is, was the appellee competent to maintain suit for the relief sought by the bill?

The answers, the evidence, the summary of the points of contention set forth in the opinion of Mr. Justice Gould, the Auditor's Report, the exceptions thereto, the final decree, and any and every other part of the Record in the case will be scanned in vain for the slightest reference to or suggestion of this objection. It had its origin in the decision of this Court in the case of Old Dominion Copper Company vs. Lewisohn, 210 U. S., 206, decided by the Court some three months after Judge Gould's decision in the case at bar and before the hearing in the Court of Appeals.

If capable of being considered at all by this Court, notwithstanding the fact that it is a point not raised below, it remains to inquire whether the decree below is, as to the point in question, in conflict with, or supported by, the case of the Old Dominion Copper Co. vs. Lewisohn.

In that case, certain promoters had acquired certain properties for the purpose of conveying them to a corporation to be organized by themselves, at an excessive valuation. They accordingly formed a new company, composed entirely of themselves, which company, with full knowledge upon the part of every incorporator of all the facts in the case, and without concealment of any kind or character, agreed to take over the properties in question and to pay therefor 130,000 shares of its capital stock, leaving some 20,000 shares in its treasury. Some of the stock, amounting in all to a 2-15 interest in the company, subsequently passed into the hands of innocent holders, the other 13-15 remaining the property of the original incorporators, who had consented to the purchase. The suit was a bill by the corporation against the estate of one of the deceased promoters, who had acted nominally as a vendor of a part of the property to the company, acquired in his name for the purpose, but really as the representative and for the benefit of all the proposed incorporators, to rescind the sale of that portion of the property, or to recover damages for the sale, to which bill a demurrer was interposed, and sustained by the Court below. The decree was affirmed upon the specific and explicit ground that the corporation had "assented to the transaction with the full knowledge of the facts." There was no stockholder who did not know the exact facts, and all the facts, attending the proposition of sale, or who had not assented to it and taken his share of the stock given in payment—every stockholder having been a promoter and an equitable part owner of the properties acquired for the purpose, and sold to the company. But, says the Court in its opinion, at pp. 213-14:

> "If there had been innocent members at the time of the sale, the fact that there were also guilty ones would not have prevented a recovery, and even might not be

a sufficient reason for requiring all the guilty members to be joined as defendants in order to avoid a manifest injustice. Stockton vs. Anderson, 40 N. J. Eq., 486."

The manifest injustice referred to, namely, that of compelling one promoter to refund the entire excessive price, although he acted only for himself and all the other stockholders, the latter of whom knew all the facts and received and still held their share of the excess thus sought to be recovered from him alone, is wholly wanting here, where the appellants are sued for their own secret profit, only.

The theory of the bill was that the promoters, concededly trustees for the proposed corporation up to the time of its organization, continued to be trustees for later subscribers to the capital stock, which it was the promoters' plan to obtain. The Court held that the corporation was a continuing entity, from the time of its original existence, unchanged by its changing stockholder constituency; and that, as it would have been estopped while its stockholders remained the same to rescind or recover damages for the sale made to it, with the full knowledge and consent of all concerned, it remained so estopped notwithstanding that, later, a 2-15 interest in the stock was obtained by subsequent purchasers who bought without notice—the rights of these being left to be determined between themselves and the parties who induced them to purchase their stock.

The utter absence of analogy between this case and the case at bar is self-obvious. The appellee corporation was not chartered until June, 1904. At that time, General Reid was a holder of 35 assessable shares and Dr. Sowers, who neither received nor was to receive any promoters' stock at all, held 6 assessable shares, making 41 shares out of 90. It is an undisputed fact that the sale to the corporation, for $35,000, of land the actual price of which was $20,000, and the conversion to their own use by the ap-

pellants, and according to their statement by Micou, of the remaining $15,000, was wholly unknown to Reid, Sowers, or to Herbert, the holder in good faith of 9 of the promoters' shares. In such a situation, the Court says in its opinion, as above noted, "If there had been innocent members at the time of the sale, the fact that there were also guilty ones would not prevent recovery." The corporation is not estopped under such circumstances, and, therefore, the very ground upon which the Court proceeded in Old Dominion Copper Co. vs. Lewisohn is lacking. The absence, also, of analogy with respect to the injustice referred to in the opinion, has already been pointed out.

APPELLANTS' AUTHORITIES.

With the doctrine of Blum vs. Whitney, 185 N. Y., 236, cited at p. 16 of the brief for appellant, that, when all the stock of one or more companies is exchanged for the stock of another company, and the promoters are the only ones interested, the latter are not liable to subsequent purchasers of the shares of stock of the new company, we have no quarrel, the doctrine thus deduced by appellant from Blum vs. Whitney being the same as that laid down by this court in Old Dominion Copper & Smelting Co. vs. Lewisohn, 210 U. S., 206.

Of the further authorities cited at page 17, the following are to the same effect: Foster vs. Seymour, 23 Fed., 65; Seymour vs. Spring Forest Cemetery Association, 144 N. Y., 333, 340; Parsons vs. Hayes, 14 Abb. N. C., 419, 434; Barr vs. N. Y. R. R., 125 N. Y., 263, 273; Higgins vs. Lansing, 154 Ill., 301; St. Louis R. R. Co. vs. Tiernan, 37 Kans., 633; Walburne vs. Chenault, 43 Kans., 352, 361; Thompkins vs. Sperry, 96 Md., 560, 583; Swift vs. Smith, 65 Md., 428; Merchants' Bank vs. Bellington Coal and Coke Co., 41 S. E. Rep., 390, 398; Clarke vs. Ameri-

can Coal Co., 17 L. R. A., 557; McCracken vs. Robinson, 57 Fed., 375; *In re* Ambrose Lake Co., 14 Ch. Div., 390; Salamon vs. Salamon, L. R. App. Cases, 22; Garretson vs. Crude Oil Co., 146 Cal., 184, and *obiter*, Divine vs. United States S. M. Co., 38 S. W. Rep., 98; Wood vs. Corey Water Works Co., 44 Fed., 146.

The following citations, at the same page, appear not to be relevant to the questions presented in this case: Ft. Madison Bank vs. Alden, 129 U. S., 373; Thornton vs. Wabash R. R. Co., 81 N. Y., 462; King vs. Barnes, 109 N. Y., 267, and Ins. Press vs. Montauk Wire Co., 103 App. Div., N. Y., 472.

Spaulding vs. North Milwaukee Town Site, 106 Wis., 481, while apparently without bearing upon the question for which it is cited, is pertinent in its ruling, at page 480, that, in order to enable a corporation to sue and recover secret profits from its promoters for buying land at one price and selling it to the corporation at a higher, it must have been deceived and misled into paying the excessive price; that "a corporation as an entity cannot be deceived save as *some* of the individuals composing it are deceived," and that there must "be actual misleading of *some of their associates*, either by their affirmative words or acts or by their silence." In other words, the case is an authority supporting the decree of the court below in the case at bar.

So in A. R. L., T. & C. Co. vs. W. L. R. & T. Co., 1[illegible] Col., 599, another citation from the appellant's brief without apparent relevancy otherwise to the case at bar, the court declared it to be "an elementary principle that a shareholder must protect his interests in a corporation through the corporate organization, if possible," and that it is only when the corporation refuses to sue that he may himself maintain an action. "It is a part of the contract of sub-

scription of a shareholder that the affairs of the corporation shall be governed and controlled by its directors or trustees, or other duly authorized agents."

So Cook on Corporations, 6 Ed., Sec. 651, p. 1888, while, read in the light of its citations (Stratton vs. Pines, 126 Fed., 968; S. C. 135 Fed., 439), without application to the present case for the proposition for which it is cited, at pages 16-17 of the brief, declares: "The corporation cannot be compelled to pay to the promoters such part of the purchase price as they were to have for their profits, where they misrepresented the price which the original owner of the property was to receive."

The decree below, it is submitted, was without error, and should be affirmed.

J. J. DARLINGTON,
Solicitor for Appellee.

DAVIS v. LAS OVAS COMPANY, INCORPORATED.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 67. Argued December 16, 1912.—Decided January 20, 1913.

Where the true consideration of a syndicate purchase is concealed and the property is conveyed at a higher figure in shares of stock to a corporation whose stock is held partly by the members of the syndicate and partly by others and the necessary moneys of shares to pay for the property goes to some of the syndicate promoters as a secret profit, the corporation may maintain an action to enjoin them claiming the shares to surrender them for cancellation.

Fraud in the purchase of property which is to be conveyed to a corporation conveyed partly of those purchasing the property and partly by others may become operative against the corporation itself and give it a right to maintain an action against some or all of those guilty of the fraud to prevent the innocent stockholders who bought in ignorance thereof.

A company in such an action is not deemed because the benefits would inure to some of the guilty as well as to the innocent stockholders. The corporation may sue one or all of those participating in such a fraud, and there is no fatal omission of parties if all are not joined. Where the fraud on a corporation resulted in the issuing of more stock than would otherwise have been necessary, the proper decree is to compel those who fraudulently obtained the additional stock to surrender it for cancellation.

5 App. D. C. 372, affirmed.

The facts are stated in the opinion.

Mr. Samuel A. Putnam and *Mr. J. R. M. Norton* for appellants.

The company proved no right to the relief prayed for. It was merely a receptacle for the property, a creature created for the convenience of the syndicate. The syndicate instead of taking the property in their own name put it in a company, which company was themselves, and only themselves, and gave it back to themselves in the shape of a certain number of shares of stock. Old Dominion Copper Co. &c. v. *Lewisohn*, 210 U. S. 206; Morawetz on Corporations (2d ed.), § 202.

When directors issue the whole stock of the company for property worth less than the par amount no one is injured. Cook, Corporations (6th ed.) § 651; *Blum* v. *Widney*, 183 N. Y. 262 (1906); *Stratton* v. *Pinos*, 125 Fed. Rep. 933; aff'd 135 Fed. Rep. 449.

When all the stock of a corporation is issued in payment for property the vendor cannot be held liable for misrepresentations as to the value of the property. *Foster* v. *Sqyuers*, 93 Fed. Rep. 66; *McClendon* v. *Robinson*, 57 Fed. Rep. 378; *Du Pont* v. *Tilden*, 42 Fed. Rep. 97; *Wood* v. *Carey Water Works*, 44 Fed. Rep. 146; *Fort Madison Bank* v. *Alden*, 129 U. S. 372; *Barr* v. *N. Y., L. E. & W. R. Ry. Co.*, 125 N. Y. 263, 273; *Squyers* v.

Spring Forest Ass'n., 144 N. Y. 333; *Thornton* v. *Wabash Ry. Co.*, 81 N. Y. 462, 467; *Parsons* v. *Hayes*, 14 Abb. N. C. (N. Y.) 413, 434; *King* v. *Barnes*, 109 N. Y. 267, 268; *Insurance Press* v. *Montauk Wire Co.*, 103 App. Div. (N. Y.) 472; *Higgins* v. *Lansing*, 154 Illinois, 301, 331; *Spaulding* v. *North Milwaukee Town Site Co.*, 105 Wisconsin, 481, 486; *Garretson* v. *Pacific Crude Oil Co.*, 146 California, 194; *St. L., F. S. & W. Ry. Co.* v. *Tiernan*, 37 Kansas, 602, 633; *Wellborne* v. *Chenault*, 43 Kansas, 356, 361; *Arkansas &c. Co.* v. *Farmers &c. Co.*, 13 Colorado, 387; *Tompkins* v. *Sperry Jones*, 96 Maryland, 560, 582; *Swift* v. *Smith*, 65 Maryland, 428, 435; *Merchants & M. S. R.* v. *Burlington C. & I. Co.*, 41 S. E. Rep. (W. Va.) 260; *Clark* v. *American Coal Co.*, 17 L. R. A. 557, 561; *Divine* v. *U. S. M. M. & Co.*, 20 S. W. Rep. 93, 98; *In re Andrews* L. R. 14 Ch. D. 360, 365; *Salomon* v. *Salomon*, L. R. (1897) A. C. 22.

There is no legal difference between the holder of an option and a full owner of land. *Dennewey Oil Co.* v. *Dennewey*, 64 Pa. St. 49; *Cummings* v. *Bonsers*, 103 Virginia, 220.

Neither Reid, who absolutely controls the company and its directors, nor Bowers can use the company to sue for an alleged wrong done to them by Davis and Phillips.

The syndicate agreement affords no basis of claim on the part of the company. The syndicate agreement was wholly between the parties thereto. *Hutchinson* v. *Simpson*, 92 App. Div. (N. Y.) 382; *Blanc* v. *Whitney*, 185 N. Y. 232, 241.

The formation of the company, the taking of all its stock, and the putting of the title to the property in it were all merely the carrying out of the syndicate agreement. 3 Thompson on Corporations, 2d ed., § 2607.

The company has not authorized this suit. No action of a special meeting of the board of directors is valid unless all the directors are notified, even though the presence of

to about once could not have changed the result. 3 Thompson on Corp., § 2556.

A power of attorney from one director to another to represent him at meetings of the board is illegal and void. 3 Thompson on Corp., §§ 2000, 2002.

Herbert and Mixon should have been made parties.

Here the members of the syndicate, although members of the corporation, are not joined and it is sought to throw the burden of their act upon a single one. See *Shields* v. *Barrow*, 17 How. 130; *Barney* v. *Baltimore*, 6 Wall. 280; *Jesup* v. *Illinois Cent. R. Co.*, 36 Fed. Rep. 726.

It was error to decree cancellation of stock.

Equity will surely not allow the plaintiff to purposely have cut sense and make victims of a part without good reason. Thompson on Corp., §§ 465, 472; *Old Dominion Copper Mining Co.* v. *Lewisohn*, *supra*.

The measure of the recovery in equity is only the net secret profits. *McIlhenny's Appeal*, 61 Pa. St. 183; *Rosse Silver Mining Co.* v. *Grant*, 11 L. R. Ch. Div. 918; 7 Am. & Eng. Enc., p. 22; *Littel* v. *Julius Lansburgh Furniture Co.*, 86 Virginia, 340. *Voisr* v. *U. S. Paper Co.*, 107 Fed. Rep. 242, distinguished.

While a promoter may be charged with secret profits he is entitled to his expenses. *McIlhenny's Appeal*, 61 Pa. St. 183.

Parties are not allowed to take inconsistent positions in legal proceedings. 7 Am. & Eng. Enc. Law, p. 22. *Littel* v. *Julius Lansburgh Furniture Co.*, 86 Virginia, 340.

The authorities relied on by the appellee company are unlike the case at bar. They were cases where the public was brought in as subscribers and were deceived or defrauded, as in *Voisr* v. *U. S. Paper Co.*, 107 Fed. Rep. 242; *Belanger* v. *New Sombrero Phosphate Co.*, 3 App. Cases, 1218, and *Charlesteis* v. *Barnes* (1900), A. C. 240.

Mr. J. J. Darlington for appellee.

Memorandum opinion by direction of the court. By Mr. Justice Lurton.

This is a bill by the appellee to recover from appellants secret profits made by them as promoters of the Las Ovas Company in the purchase of a part of a tract of land known as Las Ovas in the Republic of Cuba, and also for the cancellation of certain shares of stock issued to them as promoters.

The facts essential to judgment are not in serious dispute. They are found clearly and fully stated in the opinion by Mr. Justice Gould of the Supreme Court of the District of Columbia, and again in the opinion of the Court of Appeals of the District by Mr. Justice Robb.

From the facts found by both courts it appears:—

a. That the appellants and certain other persons, not parties to this suit, signed an agreement on March 11, 1904, by which they agreed to purchase for a corporation which they were to organize a specified part of a tract of land in Cuba called the Las Ovas plantation, for the price of $94,000, to which it was later agreed to add another small parcel at an additional price of $1,000.

b. It was further agreed that they should organize a corporation, of which they should be the incorporators, with a capital stock of $150,000, and that 40% of the shares should be issued to them for services as promoters, and that the remaining stock should be subscribed for by them. For this subscribed stock they were to pay an amount sufficient to cover the purchase money of $95,000 and to create an expense fund of $5,000.

c. It was agreed that the property should, when acquired, be placed in the hands of one of the group of promoters until the formation of the company, and then conveyed to it.

d. The scheme was one originated and engineered by

the appellants, who at the time of this agreement had already secretly secured an option for themselves for the purchase of this property at the price of $20,000. To conceal the true consideration from their associates they caused the property to be conveyed by the vendor to one Escalante, a stranger selected by them. The deed to Escalante recited the true consideration. Later, in pursuance of the promoters' agreement, they caused Escalante to convey to the member of the syndicate selected to hold the title until organization, reciting a consideration of [illegible],000.

The corporation was organized as planned. The promoters' shares were duly issued and the remaining shares taken by the promoters upon the agreed terms, its officers and directors being composed exclusively of the members of the syndicate. Thereupon the property was transferred to the company and paid for, through appellants, out of the proceeds of the subscribed stock.

The result of the transaction was that the corporation was required to pay to those who had assumed to act for and represent it, a secret profit of fifteen thousand dollars and also to compensate them for their services in buying the land and organizing the company by issuing to each of them fifteen thousand dollars in non-assessable shares of its stock.

The decree below required the appellants to account for the profits realized by them, in part traced to certain shares in their hands, and to surrender for cancellation the shares issued to them as promoters.

It is now said that the corporation was "a mere convenient receptacle for the property, created for the convenience of the syndicate." That the property was bought by the syndicate for their own advantage and that the corporation included only the members of the syndicate. That the stock of the company was all taken by the appellants, who, for property which was their own, agreed

to pay enough to cover the purchase price and create a small expense fund.

Upon this contention it is urged that the corporation has no right to the relief sought, as the whole transaction was a mere form adopted by the parties for their own convenience as owners of the property and owners of the corporation. It is then said: "If we admit, for the purpose of this point, that appellants did deceive some of the syndicate, what has the company to do with it?" For this the case cite *Old Dominion Copper Company* v. *Lewisohn*, 210 U. S. 206, where it was held that a subordinate fraud practised by some of the promoters of a corporation upon some of their associates was a matter wholly between them and the syndicate which gave rise to no corporate right of action in the absence of innocent incorporators or stockholders.

But that is not this case. Some of them, if not all, interested by appellants in the property and in its purchase for a proposed combination were ignorant of the real price which they were to pay for it, and were not, therefore, in complicity with their scheme to make a secret profit. These innocent members of the syndicate became stock subscribers and directors of the company, as did appellants. The buyers and sellers were not the same. Those of the syndicate assuming to act for the corporation in acquiring the property were under obligation to disclose the truth and deal openly. In the absence of such disclosure the corporate assent was obtained on false grounds. The wrong was done when those members of the syndicate not in complicity with appellants subscribed to the stock of the company and aided their guilty associates to engage in the corporate action necessary to the corporate acquisition of the property at the exaggerated price placed upon it by those who were to realize a secret profit. Thus the original fraud practised upon some of those associated with them in the promoters' arrangement became operative against the corporation itself. The standing of the

corporation results from the fact that these were innocent and deceived members of the corporation when the property was taken over by it.

Neither is the corporate right of action defeated by the fact that the recovery will inure to the guilty as well as to the innocent, nor is the fact that all of the parties who may have shared in the secret profits are not made parties to the case. The corporation may well sue either one or all of those who received secret profits. There is no want of necessary parties because all are not here sued.

The distinction between a case in which all of the owners of the property and all of the members of the buying corporation are the same persons, and participate in the profit realized, and the case here presented is fully recognized in *Old Dominion Copper Company* v. *Lewisohn*, *supra*, as well as in *Phosphate Company* v. *Erlanger*, 8 Ch. Div. 73, and in the well considered opinion of Judge Severens in *Yeiser* v. *U. S. Paper Co.*, 167 Fed. Rep. 240.

There was no error in cancelling the shares issued to the plaintiffs in error for promotion of the corporation. They and the other members of the syndicate received these shares upon the assumption that they had in good faith served the corporation in the procurement of the property. Obviously appellants were serving themselves to the detriment of the corporation and innocent subscribers to its stock. In such a situation the corporation may recover the shares.

The decree will be affirmed.